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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

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CAPTAIN D'S, LLC
*Petitioner,*

v.

TAMMY SMITH, by and through her father and next friend, ALVIN CHRISTOPHER SMITH,
*Respondent.*

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**On Petition for a Writ of Certiorari to the Mississippi Supreme Court**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Mississippi Supreme Court erred when, after finding that a valid and enforceable agreement to arbitrate existed between the parties, it held that as a matter of law certain common law tort claims arising out of an alleged sexual assault incident on a minor in the workplace are unsuitable for arbitration under the Federal Arbitration Act ("FAA").

2. Where a party's federal rights under the FAA turn on an antecedent application of state-law to the arbitration clause itself, which is interwoven with federal substantive law, whether a state court can nullify a party's right to arbitration by manipulating state-law principles in order to single out particular types of grievances as being unsuitable for arbitration.

3. Whether the Fourteenth Amendment's procedural protections extend to preclude a deprivation of rights afforded under the FAA without due process being afforded.

## RULE 14.1(b) STATEMENT

The following were parties to the proceedings before the Mississippi Supreme Court:

1. Captain D's, LLC; Defendant-Appellee; Petitioner on Review.
2. Tammy Smith (by and through her father and next friend, Alvin Christopher Smith); Plaintiff-Appellant; Respondent on Review.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

There is no parent corporation or publicly held corporation owning 10% or more of the stock of Captain D's, LLC, Petitioner herein.

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**On Petition for a Writ of Certiorari to the Mississippi Supreme Court**

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## PETITION FOR A WRIT OF CERTIORARI

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## INTRODUCTION

It is firmly-settled that the FAA, enacted pursuant to the Commerce Clause, is substantive federal law enforceable in state courts and applicable to state common law causes of action. *Southland Corp. v. Keating*, 465 U.S. 1, 11-12, 104 S. Ct. 852, 858-859, 79 L. Ed. 2d 1 (1984). Though the enforcement of the federal rights granted under the FAA may, in appropriate circumstances, involve state-law principles of contract interpretation, protecting and preserving these federal rights relies on an interwoven and overarching application of federal substantive law to ensure that the state-law principles are not

manipulated to disguise the singling out of arbitration for suspect status, thus nullifying the FAA. See *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) (cited in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. University*, 489 U.S. 468, 475, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)). Indeed, it is this Court which must provide protection against "a state court's construction of a contract in such a way as to preclude enforcement of a federal right." *Volt*, 489 U.S. at 482 (Brennan, J., dissenting).

These principles play leading roles in this petition as the Mississippi Supreme Court refused to give "equal-footing" status to the parties' valid agreement to arbitrate and, in so doing, created a substantive rule of law which stands in conflict with decisions of this Court and which now must be followed by the U.S. Court of Appeals for the 5th Circuit in diversity cases; namely, that common law tort claims are non-arbitrable where they arise out of a sexual assault incident in the workplace, notwithstanding the plain and unambiguous language of the arbitration agreement.

## OPINIONS BELOW

The Mississippi Supreme Court's decision is reported at 963 So. 2d 1116, 100 Fair Empl. Prac. Cas. (BNA) 1745, 154 Lab. Cas. P. 60,433, 26 IER Cases 385. App., *infra*, 1a-17a. The Mississippi Supreme Court handed down its original decision on June 14, 2007, and denied rehearing on September 13, 2007. App., *infra*, 25a. The judgment of this state court of last resort operated to reverse the December 13, 2005, decision of the Circuit Court of Alcorn County, Mississippi. App., *infra*, 18a-24a.

## BASIS FOR JURISDICTION

This petition comports with the conditions prescribed by the governing statute for the Court's acceptance of jurisdiction over an appeal; namely, that the appeal be taken from a "[f]inal judgment . . . of the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). The jurisdiction of the United States Supreme Court is invoked in a timely and proper manner. The order of the state supreme court denying Petitioner's motion for rehearing was entered on September 13, 2007, and this petition is being submitted within the ninety (90) day time period allowed by the statute for the taking of an appeal to this Court. 28 U.S.C. § 2101(c).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions involved in this case are the Supremacy Clause of the United States Constitution; the Fourteenth Amendment to the United States Constitution; and § 2 of the Federal Arbitration Act ("FAA") which provide, respectively:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2 (App., *infra*, 26a);

> No State shall . . . deprive any person of life, liberty, or property, without due process of law;

> nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1 (App., *infra*, 27a); and

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. App., *infra*, 28a.

## STATEMENT OF THE CASE

The genesis of this appeal is the Mississippi Supreme Court's ad hoc singling out of certain claims as being unsuitable for arbitration by refusing to enforce the plain and unambiguous terms of a valid arbitration agreement entered into by and between employer and employee, where the employee's common law tort claims against employer stemmed from an alleged sexual assault by the employer's manager. The decision of the state court does violence to the Constitution of the United States of America and to the FAA.

### A. Factual Background

Petitioner Captain D's, LLC, owns and operates several hundred seafood restaurants across the United States as well as in several countries. Throughout its restaurants, Captain D's and its employees universally enter into a stand-alone arbitration agreement,

conspicuously titled "EMPLOYEE DISPUTE RESOLUTION PLAN."

On February 3, 2004, Respondent, Tammy Smith, was a 17-year-old applicant for a job at a Captain D's restaurant in Corinth, Mississippi. In connection with securing employment there, Smith executed the stand-alone arbitration agreement, which provided in relevant part:

> [B]oth Captain D's and I agree to settle ***any and all previously unasserted claims, disputes, or controversies arising out of or relating to my application for employment, employment and/or cessation of employment with Captain D's, exclusively by final and binding arbitration before a neutral arbitrator***. By way of example only, such claims include claims under federal, state and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Medical Leave Act, the law of contract and ***law of tort***.

App., *infra*, 29a-31a (emphasis added). Smith's Grandmother, Pat Spencer, also executed the Arbitration Agreement as Smith's guardian. *Id.*

### B. Proceedings Below

Unmoved by the covenant formed by the arbitration agreement, on August 17, 2004, Smith filed suit against Captain D's and her supervising manager Christopher Lee Howell in the Circuit Court of Alcorn County, Mississippi. The significant allegations of Smith's lawsuit accused Howell of sexually assaulting and raping her while on the restaurant premises, while she was working and while she was

under his supervision as her manager. Separately, Smith's lawsuit charged Captain D's with common law tort claims of negligent hiring, negligent supervision and negligent retention of Howell, seeking a judgment of compensatory and punitive damages from Captain D's on these claims.

In the state trial court, Captain D's promptly filed a notice of election of binding arbitration and moved to compel Smith's claims against it to arbitration consistent with the mandates of the FAA which subjected Smith's claims to that forum. Separate Defendant Howell, proceeding *pro se*, answered the lawsuit in the trial court but did not join in Captain D's motion or otherwise seek arbitration of the separate claims against him.

Smith resisted arbitration by claiming, foremost, that she was not bound to the agreement due to her status as a minor and, secondarily, that the costs of arbitration were prohibitive, rendering the agreement unconscionable. Smith raised no challenge to the scope of the arbitration clause.

In December of 2005, the Mississippi trial court[1] granted Captain D's motion to compel arbitration and directed the parties to arbitrate those claims which Smith leveled at Captain D's. The trial court—which had received briefing, evidence and argument on the issues presented—found that it was "apparent [Smith's] real contention is that [she], due to her minority status, should not be bound by the arbitration agreement." App., *infra*, 19a. The trial court rejected this defense, reasoning that Congress's dec-

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[1] At that time, the trial court was presided over by the Honorable Sharion R. Aycock. Judge Aycock is now a United States District Judge in the Northern District of Mississippi.

laration of a national policy favoring arbitration, together with ordinary principles at law or in equity for the revocation of any contract, commanded a finding of arbitrability. *Id.* at 19a and 23a.

Smith perfected an appeal from the trial court's decision to the Mississippi Supreme Court. Smith's "rape claim" against Howell was not part of the trial court's ruling and neither Howell nor Smith's claims against him were joined in her appeal. On appeal, Smith attacked the validity of her arbitration agreement on three limited grounds: 1) her minority status permitted her to disavow the arbitration agreement; 2) the arbitration agreement was unconscionable; and 3) Captain D's had waived its right to arbitration.[2] Again, Smith raised no challenge to the scope of the arbitration clause.

The Mississippi Supreme Court, in a divided ruling, reversed the trial court's decision compelling arbitration and directed that Smith's claims against Captain D's would be tried in a court of law. App., *infra*, 1a-17a. Significantly, the majority of the court readily determined a valid, binding arbitration agreement did in fact exist between the parties. Not ending its analysis with the issues raised by the party resisting arbitration, however—and taking an unprecedented measure—the court presumed to consider, *sua sponte,* whether Smith's claims were within the scope of the arbitration agreement, despite the critical fact that Smith *never* raised such a defense to arbitration and, accordingly, the trial court had never considered or passed upon such a defense—much less had Captain D's been afforded

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[2] Smith raised the defense of waiver for the first time on appeal.

the right to meet and rebut the defense. See *Leverett v. State*, 197 So. 2d 889, 890 (Miss. 1967) (holding, "[t]he [Mississippi] Supreme Court is a court of appeals, it has no original jurisdiction; it can only try questions that have been tried and passed upon by the court from which the appeal is taken. Whatever remedy appellant has is in the trial court, not in this court. This court can only pass on the question after the trial court has done so.") (quoting *Collins v. State*, 159 So. 865 (1935)).

Even so, the Mississippi Supreme Court correctly found that the language of the arbitration agreement—namely, the language: "any and all previously unasserted claims, disputes, or controversies arising out of or relating to my . . . employment"—made it a broad arbitration provision under federal substantive law (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)), "capable of expansive reach." Still, the majority summarily concluded from there that "[w]hile recognizing the breadth of the language in the arbitration provision, we unquestionably find that a claim of sexual assault neither pertains to nor has as connection with [Smith's] employment."

Recognizing the violence done to Captain D's rights by the majority, Justice Dickinson, in dissent, observed:

> The majority and I are in agreement that Tammy Smith and Captain D's entered a valid, binding arbitration agreement. There were no other issues raised by the parties and briefed to the trial court or to this Court on appeal. Thus, the majority today takes the unusual step of deciding an . . . appeal on an issue never raised or briefed by either party, and not discussed by the trial court.

The Mississippi Supreme Court was never called upon, Justice Dickinson pointed out, to decide the issue *vel non* of whether a "rape claim" arises out of or relates to employment, and noted that "in its zeal to separate what it calls "[Smith's] rape claim" from the scope of her arbitration agreement, the majority fails to absorb the fact that [Smith] filed no rape claim against Captain D's." Smith's claims against Captain D's sounded in common law tort theories of "negligent hiring, negligent supervision, and negligent retention." *A fortiori*, Justice Dickinson quipped that "[i]t could be argued that [Smith's] claims against Captain D's so clearly related to her employment that [Smith's] counsel didn't even bother raising the issue with the trial court or here. One would think that if [Smith's] counsel concluded the argument had any merit whatsoever, it would have at least been raised and argued." Justice Dickinson concluded, "[b]ecause the majority decides this appeal on an issue never raised; ignores the need for a factual determination; and simply decides *as a matter of law* that [Smith's] claims do not relate to her employment, I respectfully dissent." App., *infra*, 12a-17a (emphasis added).

Captain D's moved for rehearing by the Mississippi Supreme Court. On rehearing, Captain D's asserted: 1) the court arbitrarily singled out Smith's claims as being suspect for the arbitration process by judicially creating an ad hoc exception to ordinary rules of state-law which denied Captain D's its federal rights under the FAA; 2) the court, in conflict with decisions of this Court, eschewed applicable federal substantive laws of arbitrability in declaring that, notwithstanding the unambiguous language of the arbitration agreement, certain types of claims, in its judgment, were simply unsuitable for arbitration; and 3) the court decided an important federal ques-

tion in a way that conflicted with the decision of other state and federal courts, including at least one state court of last resort. App., *infra*, 32a-52a.

Captain D's motion for rehearing was denied on September 13, 2007, without a written opinion. Petition for writ of *certiorari* now follows.

## REASONS FOR GRANTING THIS PETITION FOR WRIT

The Mississippi Supreme Court, in conflict with decisions of this Court and at least one state court of final resort, violated the *Moses H. Cone* principle by singling out certain types of grievances as being unsuitable for arbitration, without regard for federal policy to the contrary, thereby displaying suspicion for that forum and deepening the uncertainty in the 5th Circuit Court of Appeals as to the extent to which state-law must be followed where it has been manipulated or used as a pretense to deny a party's federal rights to arbitration.

Further, the instant ruling is the most recent in a developing line of cases in which the Mississippi Supreme Court has substituted its judgment for that of Congress in passing the FAA by declaring certain types of claims as being unsuitable for arbitration, displaying suspicion for arbitration as being an appropriate forum for dispute resolution.

Finally, the Mississippi Supreme Court violated Captain D's Fourteenth Amendment guarantees of due process.

There exists no controversy to the fact that the FAA governs this case and would mandate arbitration of the parties' dispute if its application had not been thwarted by the Mississippi Supreme

Court's creation of a rule of law that common law tort claims arising out of an alleged sexual assault incident involving a minor in the workplace are not suitable for arbitration. As a threshold matter, it is respectfully submitted that the *Moses H. Cone* principle of due regard being given "to the federal policy favoring arbitration and that ambiguities as to the scope of the arbitration clause itself are to be resolved in favor of arbitration" makes this Court's review plain, notwithstanding that the decision at issue ostensibly turned on judicial construction of an arbitration agreement. See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. University*, 489 U.S. 468, 475-476, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989) (citing *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). In contrast to this Court's resolution in *Volt* that it would not revisit a lower court's judicial interpretation of a choice-of-law provision in an arbitration agreement as "[t]here is no federal policy favoring arbitration under a certain set of rules," the case *sub judice* involves the arbitration clause itself and thus unquestionably invokes the clearly-favored *federal* policy of ensuring "the enforceability, according to their terms, of private agreements to arbitrate." *Id.* at 476.

Captain D's concedes, as it must, that the interpretation of private agreements is generally regarded as being within the domain of state-law. Overarching that general proposition, however, is the *federal* directive that courts—indeed, state courts—in determining whether parties agreed to arbitrate a dispute, must apply the "federal substantive law of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S. Ct.

3346, 87 L. Ed. 2d 444 (1985) (citing *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24, 103 S. Ct., at 941; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400-404, 87 S. Ct. 1801, 1804-1806, 18 L. Ed. 2d 1270 (1967); *Southland Corp. v. Keating*, 465 U.S. 1, 12, 104 S. Ct. 852, 859, 79 L. Ed. 2d 1 (1984)). The "equal-footing" guaranty of § 2 of the FAA—namely, that arbitration agreements be treated like all other contracts—is, above all, a federal substantive command. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006).

As the case below represents, where "the existence or the application of a federal right turns on a logically antecedent finding on a matter of state law," (*Volt*, 489 U.S. at 484 (Brennan, J., dissenting)), it enables a so-inclined court to mask disfavor for arbitration under the guise of "state-law." Where that occurs, higher scrutiny cannot be escaped. A state court's emasculation of federal rights commands ancillary review "in order that the constitutional mandate may not become a dead letter." *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100, 58 S. Ct. 443, 82 L. Ed. 685 (1938); see also *Phelps v. Board of Education of West New York*, 300 U.S. 319, 322-323, 57 S. Ct. 483, 484-485, 81 L. Ed. 674 (1937); *Irving Trust Co. v. Day*, 314 U.S. 556, 561, 62 So. 2d 398, 401, 86 L. Ed. 452 (1942).

It is this dance between principles of federal substantive law and those of state-law in the arbitration context which has created uncertainty in the U.S. Court of Appeals for the 5th Circuit (the federal circuit for Mississippi), which cries out to be settled. See *Washington Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260 (5th Cir. 2004) (Miss.). In

*Bailey,* Judge Jolly, writing for the 5th Circuit, noted that "[i]n determining whether a party should be compelled to arbitrate its claims against another, we acknowledge that whether a court should apply state law or 'the federal law of arbitrability,' (citation omitted), is often an uncertain question." *Bailey*, 364 F.3d at 267 n.6.

The call to quiet the uncertainty within the equation is underscored by the Mississippi Supreme Court effectively creating a state rule of law which singles out certain grievances as being unsuitable for arbitration—despite the validity of the agreement to arbitrate—which the 5th Circuit, sitting in diversity, will now be required to follow under the *Erie* doctrine. See *Bailey*, 364 F.3d at 264 (holding, "in determining whether the parties agreed to arbitrate a certain matter, courts apply the contract law of the particular state that governs the agreement . . . [meaning] Mississippi law applies here."); *Buchman v. BASF Corp.*, 107 Fed. Appx. 378 (5th Cir. 2004) (Miss.) (holding, Mississippi substantive law applies to breach of contract dispute where court is sitting in diversity); *Centennial Ins. Co. v. Ryder Truck Rental, Inc.*, 149 F.3d 378, 382 (5th Cir. 1998) (Miss.) (holding, in diversity case involving interpretation of contract, "we start [our resolution of the case] by determining whether or not any final decisions of the Mississippi Supreme Court are dispositive."). Superimposed, however, on the 5th Circuit's *Erie* obligations are the intertwined considerations of federal substantive law for which the federal court is also required to account. See *Bank One, N.A. v. Shumake*, 281 F.3d 507, 513 (5th Cir. 2002) ("the FAA reflects a strong policy favoring the enforcement of arbitration clauses"); *Grigson v. Creative Artists Agency*, 210 F.3d 524, 526 (5th Cir. 2000) ("Arbi-

tration is favored in the law.") (citing *Moses H. Cone Memorial Hospital v. Mercury Construction*, 460 U.S. 1, 24-25, 103 S. Ct. at 942, 74 L. Ed. 2d 765 (1983)). Conflict and uncertainty are thus deepened where unchecked state-law says one thing, but federal substantive law would compel a different.

It has been established, for example, that it is a rule of *federal* substantive law which places the burden of proving certain claims are unsuitable for arbitration squarely on the shoulders of the party resisting arbitration. *Gilmer v. Interstate/Johnson Lane Corp*, 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L.Ed.2d 26 (1991); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987); see also *Green Tree Financial Corp.-Alabama, supra*, 531 U.S. at 92, 121 S. Ct. at 522 ("We have held that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue."). The Mississippi Supreme Court relieved Smith altogether of this burden as she never claimed (much less proved) that her claims were not contemplated for arbitration by the terms of the agreement.

It is also a rule of *federal* substantive law—universally applied—that courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006); 9 U.S.C. §2. A necessary extension of this *federal* substantive rule is the preemption of discriminatory or pretextual application of ordinary principles of state-law to the interpretation of arbitration agreements. This Court has consistently "rejected generalized attacks on

arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.'" *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90, 121 S. Ct. 513, 521, 148 L. Ed. 2d 373 (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481, 109 S. Ct. 1917, 104 L. Ed. 526 (1989); *Prima Paint*, 388 U.S. at 404; *Southland Corp. v. Keating*, 465 U.S. at 16-17, n. 11, 104 S. Ct. at 862, n. 11.

As Justice Brennan noted in his dissent in *Volt*, "in order to guard against arbitrary denials of federal claims, a state court's construction of a contract in such a way as to preclude enforcement of a federal right is not immune from review in this Court as to its 'adequacy.'" *Volt*, 489 U.S. at 468, 482 (Brennan, J., dissenting). This is consistent with the holding in *Perry v. Thomas*, wherein this Court observed "[a] court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to affect what we hold today the state legislature cannot." *Perry v. Thomas*, 482 U.S. 483, 492, n. 9, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987).

The instant case therefore calls for review to preclude ad hoc applications of state-law rules from being used as an artificial aegis to scrutiny and to ensure that federal rights are not "nullified by the manipulation of state law." *Volt*, 489 U.S. at 484 (citing Wechsler, *The Appellate Jurisdiction of the*

*Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 Wash. & Lee L. Rev. 1043, 1052 (1977)). The *Moses H. Cone* principle should be applied to resolve this matter; for that principle limits state-law by paying full homage to the fact that arbitration is strictly a matter of private contract, the interpretation of which is ordinarily a question of state-law, while insisting that state-law is not manipulated to denude a party of its federal rights to arbitration. *Moses H. Cone*, 460 U.S. at 24. In other words, the analysis *cannot* begin and end with state-law. The Supremacy Clause reserves no room for state rule of law to remain wholly unchecked. U.S. Const., art. VI, cl. 2. Indeed, "[t]he FAA requires that a court determining a question of arbitrability ***not stop*** at the application of state-law rules for construing the parties' intentions, but that it also take account of the command of federal law that 'those intentions [be] generously construed as to the issues of arbitrability.'" *Volt*, 489 U.S. at 468, 487 (Brennan, J., dissenting) (quoting *Mitsubishi Motors, supra*, 473 U.S. at 626, 105 S. Ct. at 3354) (emphasis added).

In the case below, Smith, the party resisting arbitration, made narrow and limited challenges to the validity of the agreement to arbitrate. The Mississippi Supreme Court in fact found, favorably to Captain D's, that Smith entered into a valid, binding arbitration agreement—thereby rejecting her claim that the contract could be invalidated. At this point, the Mississippi Supreme Court was required to rigorously enforce the agreement. See *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 221, 105 S. Ct. 1238, 1242, 84 L. Ed. 2d 158 (1985). Instead, the court presumed to undertake consideration of whether Smith's common law tort claims were out-

side the scope of the arbitration agreement, notwithstanding that 1) Smith never challenged the scope of the arbitration agreement;[3] and 2) Smith had implicitly taken the position at the trial court level that her claims against Captain D's were within the scope of the arbitration agreement.[4] To get there, the Mississippi Supreme Court jettisoned *stare decisis* and took the unprecedented step of refusing to enforce ordinary state-law principles, granting Smith dispensation which weakened—indeed, eviscerated—the protections afforded to Captain D's under §2 of the FAA. Demonstrating judicial disfavor (or, perhaps, distrust) toward the arbitration process for Smith's claims in this case, the Mississippi Supreme Court created a principle of state-law which flowed directly from the fact that a contract to arbitrate was at issue. It cannot escape observation, either, that the underlying incident from which Smith's claims were taken involved a shocking allegation of rape of a

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[3] The corollary to this was that Captain D's was never afforded the fundamental opportunity to meet, defend and rebut such a challenge.

[4] At the trial court level, Smith had argued that "but for the intentional tort exclusion, this case would fall under the [Mississippi] Workers' Compensation Act." For a claim to "fall under the [Mississippi] Workers' Compensation Act" it must "arise out of and in the course of employment." Miss. Code. Ann. § 71-3-7. Much more, then, than simply *not* contesting that her claims fell outside the scope of the arbitration agreement, Smith actually conceded the point that her claims "arose out of" her employment—a position totally consistent with not challenging the scope of the agreement. As the subject arbitration agreement unambiguously covered all "claims, disputes, or controversies ***arising out of or relating to [Smith's] . . . employment . . . with Captain's D's***," there was never a case or controversy concerning the scope of the agreement. App., *infra*, 36a-37a.

minor. That notwithstanding, "a motion to compel arbitration should not be denied 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960).

When Justice Dickinson outed the majority for taking "the unusual step of deciding an . . . appeal on an issue never raised," what he was observing was the over-reaching but calculated desire of the majority to "separate . . . [Smith's] rape claim from the scope of the arbitration agreement." This singular observation reveals the arbitrary reluctance of the majority to submit Smith's claims to arbitration and belies any assertion that the Mississippi Supreme Court's decision rested on a non-federal and independent state ground. See *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164, 37 S. Ct. 318, 61 L.Ed. 644 (1917).

Prior to taking on the arbitrability of Smith's claims, no other state rule of law had been applied more consistently or rigorously by the Mississippi Supreme Court than the rule that an issue not raised before the lower court and only raised for the first time on appeal is deemed waived and procedurally barred. See, *e.g.*,, *Waters v. Gnemi*, 907 So. 2d 307, ¶ 39 (Miss. 2005) (holding, "[w]e have been consistent in holding that we need not consider matters raised for the first time on appeal, which practice would have the practical effect of depriving the trial court of the opportunity to first rule on the issue, so that we can then review such trial court ruling under the appropriate standard of review); *Cooper v. Lawson*, 264 So. 2d 890, 890 (Miss. 1972) (applying procedural

bar, refusing to consider matters not raised by appellant); *Leverett v. State*, 197 So. 2d 889, 890 (Miss. 1967) (holding, "[t]he Supreme Court is a court of appeals, it has no original jurisdiction; it can only try questions that have been tried and passed upon by the court from which the appeal is taken. Whatever remedy appellant has is in the trial court, not in this court. This court can only pass on the question after the trial court has done so.") (quoting *Collins v. State*, 159 So. 865 (1935)).

In other contract cases reviewed by the Mississippi Supreme Court, it has without fail refused to entertain defenses which were not asserted at the trial court level. See, *e.g.*, *Braidfoot v. William Carey College*, 793 So. 2d 642, ¶ 47, 144 Lab. Cas. P 59,343, 157 Ed., Law Rep. 432 (Miss. App. 2001) (holding "it is a rule of almost universal application that ***questions of whatever nature*** not raised in the trial court and preserved for review will not be noticed on appeal); *Anglin v. Gulf Guaranty*, 956 So. 2d 853, ¶ 26 (Miss. 2007) (the Mississippi Supreme Court refused to consider a defense to a contract of insurance which was raised for the first time on appeal, proclaiming, [t]his Court has been consistent in holding that we need not consider matters raised for the first time on appeal.").

The Mississippi Supreme Court has heretofore even applied the procedural bar when reviewing grants or denials of arbitration. See, *e.g.*, *Gulf Ins. Co. v. Neel-Schaffer*, 904 So. 2d 1036, ¶ 32 (Miss. 2004) (firmly stating that defense to arbitration on grounds of substantive unconscionability was barred based on fact that it was raised for first time during appeal); *Speedee Cash of Mississippi, Inc. v. Williams*, 915 So. 2d 1061, ¶ 6 and ¶ 7 (Miss. 2005) (holding, in review

of party's defense to arbitration on grounds of unconscionability, "there is absolutely nothing in the record to show that this claim was raised before the [trial] court . . . [t]herefore, we must treat the issue of unconscionability as one never presented to the circuit court and apply the procedural bar.").

Thus, the conclusion flowing from the case at hand is that this is not so much a case of categorical hostility toward the arbitration process as it is a case of disfavor for arbitrating certain types of claims, which is equally offensive to the FAA. By refusing to apply the procedural bar "on an issue never raised" by Smith, the Mississippi Supreme Court displayed a peculiar bias against arbitration of *certain* types of claims, substituting its judgment for the parties' consent to arbitration. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995) (FAA assures that parties' agreements to arbitrate will be enforced according to their terms ***"even if a rule of state law would otherwise exclude such claims from arbitration"*** (emphasis added)).

This case is not the first in which the Mississippi Supreme Court has determined that certain claims are, in its judgment, not suitable for arbitration. See *Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney*, 950 So. 2d 170 (Miss. 2007). There, the state supreme court, despite the plain language of the agreement, denied arbitration of *certain* types of claims by resolving that "no reasonable person" would have agreed to submit claims to arbitration where the underlying incident involved a fraudulent scheme. *Rogers-Dabbs*, 950 So. 2d at 177. One can only conclude from the *Rogers-Dabbs* case and the instant case that the more alarming the underlying

incident at issue is, the less suitable the case is for arbitration in the judgment of the Mississippi Supreme Court. This is a perilous precedent if left unchecked and a prelude to what is to come of arbitration in this state. The inclination and opportunity to judicially legislate what types of claims should and should not be arbitrated, without regard to ordinary state-law principles of contract interpretation, represents a clear and present danger that arbitration in Mississippi will not be given "equal-footing" with other private agreements.

In addition to removing the procedural bar and relieving Smith of her federally mandated burden of proving a defense (raised for her by the court) to arbitration, the Mississippi Supreme Court disregarded federal substantive law relative to the scope of the arbitration agreement at issue. Where parties have entered into an agreement to arbitrate, the court must afford a presumption of arbitrability and "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). This presumption has been said to be "particularly applicable" where the arbitration clause is found to be broad—just as the Mississippi Supreme Court found the clause to be in the instant matter. In such cases, "[i]n the absence of any ***express provision excluding a particular grievance*** from arbitration, . . . only the ***most forceful evidence*** of a purpose to exclude the claim from arbitration can prevail." *Id.* (citing *Warrior & Gulf Navigation Co., supra,*

363 U.S. at 584-85 (emphasis added). As Justice Dickinson aptly pointed out in regard to the majority's exclusion of Smith's grievances from arbitration, "[t]his Court, of course, never examined the facts because we . . . were given no facts to examine."

Nor did the Mississippi Supreme Court's decision include any of the ordinary state-law tenets of contract construction in excluding Smith's claims from arbitration. Under Mississippi law, when interpreting any contract—regardless of whether it contains an arbitration clause—the court must "accept the plain meaning of [it] as the intent of the parties where no ambiguity exists." *Ferrara v. Walters*, 919 So. 2d 876, 882 (Miss. 2005). It has further been written that the court is not to be concerned with what the parties may have intended, "but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy." *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752 (Miss.2003) (also holding that "[t]he reviewing court is not at liberty to infer intent contrary to that emanating from the text at issue."); see also, *Miss. Farm Bureau Mut. Ins. Co. v. Walters*, 908 So. 2d 765, 769 (Miss. 2005); *State Auto. Mut. Ins. Co. v. Glover*, 253 Miss. 477, 176 So. 2d 256, 258 (1965)). By declining to appraise Captain D's FAA rights with general state-law principles and in a manner which also honored the federal policy favoring arbitration, the decision of the Mississippi Supreme Court stands in conflict with every U.S. Circuit Court of Appeals. See, *e.g., PaineWebber Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996); *Chelsea Square Textiles, Inc. v. Bombay Dyeing and Mfg. Co., Ltd.*, 189 F.3d 289 (2nd Cir. 1999); *Medtronic Ave, Inc. v. Advanced Cardiovascular Systems, Inc.*, 247 F.3d 44 (3rd Cir. 2001);

*Gregory v. Interstate/Johnson Lane Corp.*, 188 F.3d 501 (4th Cir. 1999); *Bank One, N.A. v. Shumake*, 281 F.3d 507 (5th Cir. 2002); *Salary Policy Employee Panel v. Tennessee Valley Auth.*, 731 F.2d 325 (6th Cir. 1984); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126 (7th Cir. 1997); *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793 (8th Cir. 2004); *Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001); *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474 (10th Cir. 1996); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005); *Ekstrom v. Value Health, Inc.*, 68 F.3d 1391 (D.C. Cir. 1995); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006).

The Mississippi Supreme Court, instead, "skillfully and smoothly" resolved that "the question of 'scope' is narrowed to whether [Smith's] ***rape claim*** arises out of or relates to '[Smith's] application for employment with Captain D's,' so as to subject [her] ***sexual assault claim*** to arbitration," ruling that it did not. This holding represented an inappropriate co-mingling of Smith's claims against Captain D's with her claims of sexual assault, which were stated independently against Captain D's manager, Christopher Howell. In addition to the deepening tension this ruling (together with the ruling in *Rogers-Dabbs, supra*) will create within the 5th Circuit when it is called upon to follow Mississippi law, the Mississippi Supreme Court's refusal to distinguish the common law tort claims flowing between the parties to the arbitration agreement (Smith and Captain D's) from the independent claims of rape and sexual assault flowing between non-parties to the agreement (Smith and Howell), stands in conflict with the Alabama Supreme Court's decision in *Ryan's Family Steak Houses, Inc. v. Regelin*, 735 So. 2d 454 (Ala. 1999).

There, the parties—a restaurant-employer and six (6) of its employees—had agreed in writing to resolve any "employment-related disputes" by arbitration. *Regelin*, 735 So. 2d at 455. Subsequently, the employees sued their employer for, *inter alia*, negligent training and supervision. *Id.* These claims arose out of sexually inappropriate conduct which occurred in the workplace. *Id.* The restaurant-employer moved to compel arbitration and the plaintiffs resisted it. *Id.* at 456-57. The Alabama Supreme Court properly reviewed the arbitrability issue under 9 U.S.C. §2 and federal substantive law applicable thereto, finding that the employees had agreed to submit all "employment-related disputes"[5] to arbitration and thus the claims were directed to arbitration. *Id.* 457. Accordingly, in Alabama, where Captain D's has restaurants, Smith's claims would be arbitrable under the FAA, but not in Mississippi. The conflicting results in the different states cannot be attributed to differing principles of state-law. It can only be said that the conflict arises directly from a state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue. This does not comport with the requirement of § 2 of the FAA. See *Prima Paint*, 388 U.S. at 404, 87 S. Ct. at 1806; *Southland Corp. v. Keating*, 465 U.S. at 16-17, n. 11, 104 S. Ct. at 862, n. 11.

The FAA was specifically enacted "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate," (citation omitted) and to place such agreements "upon the same footing as other contracts" (citation omitted). *Volt*, *supra*, 489 U.S.

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[5] This is substantially similar language to the Captain D's-Smith arbitration agreement, *i.e.*, "arising out of or relating to . . . employment."

468 at 478. With a proper application of federal law in this case, the state court's judgment would have been different.

Finally, Captain D's had a legitimate claim of entitlement to freely contract with Smith to have claims between them arbitrated without worry or danger that the state would infringe on that right without procedural due process being afforded. *Meyer v. State of Nebraska*, 262 U.S. 390, 399 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (recognizing the right of the individual to contract as a liberty guaranteed by the Fourteenth Amendment to the Constitution); U.S. Const. Amend. XIV, § 1. The Due Process Clause of the Fourteenth Amendment thus required that any deprivation of Captain D's rights to contract for arbitration with Smith be preceded by adequate notice and an opportunity to be heard on same so that it could fully enjoy such rights. See *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 725 (1975). The Mississippi Supreme Court acted in derogation to the guarantees of due process by taking away Captain D's contract rights based on "an issue never raised or briefed by [Smith] and not discussed by the trial court." (Dickinson, J., dissenting) App., *infra* 14a. Heretofore, the Mississippi Supreme Court had assured litigants that it would not consider "questions of whatever nature" which had not been timely raised at the trial court level. *See* cases on the procedural bar, *supra*. Without any notice to Captain D's and after the parties had fully litigated the narrow issues joined in the case, the Mississippi Supreme Court changed the rules mid-game and took away Captain D's contract rights without advance notice that the scope of the arbitration agreement would be called into question such that Captain D's could come in and duly defend.

As this Court wrote in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), the right to be heard ensured by the guarantee of due process "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id.* at 314; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S. Ct. 2965, 2974-2975, 86 L. Ed. 2d 628 (1985); *Schroeder v. City of New York*, 371 U.S. 208, 212-213, 83 S. Ct. 279, 282-283, 9 L. Ed. 2d 255 (1962).

That Captain D's—after the fact of the ruling—filed a motion seeking reconsideration of the Mississippi Supreme Court's decision and challenged the basis thereof did not cure the deprivation of due process which had already occurred. Had due process been afforded as the Constitution requires, Smith would have had the burden of proving she did not agree to arbitrate the claims at issue (see *Gilmer, supra*, 500 U.S. at 26) and Captain D's would have had fair opportunity to meet, defend and rebut the challenge. See *Armstrong v. Manzo,* 380 U.S. 545, 550-551, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965) (holding that "whatever constitutional infirmity resulted from the failure to give the petitioner notice [was not] cured by the hearing subsequently afforded to him upon his motion to set aside the decree."). Merely having the chance to convince the majority to re-examine their already fixed view of the case on rehearing is not due process. The right of a party to protect its freedom to contract under § 2 of the FAA is wholly devalued unless fair notice is given ahead of time that the right is imperilled. The Mississippi Supreme Court's decision flies in the face of this paramount guarantee.

## CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of *certiorari*.

Respectfully submitted,

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## APPENDIX A

SUPREME COURT OF MISSISSIPPI
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June 14, 2007

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 14th day of June, 2007.

Supreme Court Case # 2006-CA-00024-SCT
Trial Court Case # CVO4-281AA

Tammy Smith by and through Her Father & Next Friend, Alvin Christopher Smith v. Captain D's, LLC

Reversed and Remanded. Appellee taxed with costs of appeal.

* NOTICE TO
CHANCERY/CIRCUIT/COUNTY COURT CLERKS *

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

[Received JUN 15, 2007]

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-06024-SCT

TAMMY SMITH by and through her father & next friend, ALVIN CHRISTOPHER SMITH,

v.

CAPTAIN D's, LLC.

DATE OF JUDGMENT:
12/21/2005
TRIAL JUDGE:
HON. SHARION R. AYCOCK
COURT FROM WHICH APPEALED:
ALCORN COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:
DUNCAN L. LOTT
ATTORNEY FOR APPELLEE:
BRADLEY FAREL HATHAWAY
NATURE OF THE CASE:
CIVIL - PERSONAL INJURY
DISPOSITION:
REVERSED AND REMANDED - 06/14/2007
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

EN BANC.

CARLSON, JUSTICE, FOR THE COURT:

Tammy Smith, by and through her father and next friend, Alvin Christopher Smith, sued Captain D's, LLC, in the Alcorn County Circuit Court for negligent hiring, supervision, and retention based upon alleged rape by a supervisor. The trial judge granted Captain

D's motion to compel arbitration and dismissed all of Tammy's claims against Captain D's. Tammy appeals, requesting that this Court reverse the trial court's grant of Captain D's motion to compel arbitration and dismissal of her lawsuit, and remand this case to the trial court for a full trial on the merits. Upon careful consideration of the issues presented, we agree with Tammy and thus reverse the trial court's grant of Captain D's motion to compel arbitration and dismissal of Tammy's claims, and we remand this case to the trial court for further proceedings consistent with this opinion.

## FACTS AND PROCEEDINGS IN THE TRIAL COURT

On February 3, 2004, Tammy Smith (Tammy), then seventeen years old, along with her grandparents[1] visited Captain D's restaurant[2] in Corinth. While they were eating, Tammy's grandmother, saw her friend, Peggy Jones (Jones), a manager of Captain D's. She approached Jones for an employment application for Tammy. Jones retrieved an employment application and delivered it to Tammy's grandmother. After eating, Tammy and her grandparents left the restaurant with the application.

At home, Tammy filled out the application for employment, which included a single-page arbitration agreement entitled "CAPTAIN D'S EMPLOYMENT DISPUTE RESOLUTION PLAN."[3] The agree-

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[1] In July, 2003, Tammy moved in with her grandparents for personal reasons that need not be discussed here.

[2] Captain D's is a seafood restaurant owned and operated by Captain D's, LLC.

[3] There is evidence in the record indicating that Tammy and her grandmother may have actually signed the one-page arbi-

ment required both Captain D's and Tammy to submit claims between them to binding arbitration. The agreement stated that if Tammy did file a lawsuit, Captain D's could use the agreement to dismiss the lawsuit and compel arbitration.

Jones would later testify that she told Tammy that her grandmother had to sign the agreement because Tammy was a minor. Tammy signed the arbitration agreement as the applicant and her grandmother signed on the line provided for a guardian.[4]

On August 17, 2004, Tammy filed suit in the Alcorn County Circuit Court against Captain D's and Christopher Lee Howell (Howell),[5] alleging that Howell, a manager of Captain D's, assaulted and raped her during working hours. Tammy's complaint asserts that Captain D's was negligent in its hiring, supervising, and retention of Howell.

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tration agreement while at the restaurant. Captain D's arbitration plan consisted of the single-sheet agreement and a 32-page informational booklet describing the agreement. Jones testified in her deposition that she was unsure of whether the copy of the booklet she gave Tammy was the December 2003 version or the revised, February 2004 version.

[4] Tammy argues that her grandmother was not her court-appointed guardian and, thus, did not have the authority to sign the arbitration agreement as Tammy's guardian, thereby rendering the agreement ineffective. Captain D's argues that, even if Tammy's grandmother was not Tammy's court-appointed guardian, she was acting *in loco parentis*. Because this has no effect on our decision, we choose not to address this issue today.

[5] Howell proceeded pro se, and he is not a party to this appeal. He answered the lawsuit in the trial court, but did not join in Captain D's motion or otherwise move to compel arbitration.

On September 16, 2004, Captain D's filed a Notice of Election of Binding Arbitration, Motion to Dismiss Complaint and to Compel Arbitration, and Alternative Motion to Dismiss Based on the Exclusive Remedy of the Mississippi Workers' Compensation Act and Separate Answer Subject to Motions to Compel Arbitration and to Dismiss. Tammy responded by, inter alia, objecting to arbitration.

The issues were joined and a hearing was held on May 3, 2005, Judge Sharion Aycock, presiding. Judge Aycock subsequently entered a Memorandum Opinion on December 14, 2005, granting Captain D's motion to compel arbitration and dismissing Tammy's claims against Captain D's in the circuit court. A final judgment consistent with the memorandum opinion was entered on December 28, 2005.

Tammy submitted her Petition for Interlocutory Appeal to this Court, requesting interlocutory review of the trial court's final judgment. On February 15, 2006, this Court found that final judgment had been entered as to Captain D's pursuant to Miss. R. Civ. P. 54(b), and further found that Tammy's petition for interlocutory appeal should be treated as a timely filed notice of appeal from a final judgment.

## DISCUSSION

A trial court's grant or denial of a motion to compel arbitration is a question of law; therefore, we apply a de novo standard of review on appeal. *Howard v. Estate of Harper*, 2006 Miss. LEXIS 626, *3 (Miss. 2006) (citing *Sennett v. United States Fid. & Guar. Co.*, 757 So. 2d 206, 209 (Miss. 2000)); *Pre-Paid Legal Servs. v. Battle*, 873 So. 2d 79, 82 (Miss. 2004) (citing *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719,

721 (P 5) (Miss. 2002)). *See also East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002).

Tammy presents three issues to be decided in today's case: (1) whether a minor may disaffirm an arbitration agreement based on the infancy doctrine; (2) whether the arbitration agreement is unconscionable; and (3) whether the right to arbitration is precluded by the assertion of an alternative affirmative defense. However, finding one issue to be dispositive, we restate the critical issue for clarity in discussion.

## WHETHER THE PARTIES AGREED TO ARBITRATE

In the appellant's brief, Tammy's counsel unquestionably focuses the majority of his argument on Tammy's minority status; however, in discussing the various issues, Tammy acknowledges the basic law on arbitration as discussed by this Court in interpreting the Federal Arbitration Act (FAA) and in applying the decisions of the United States Supreme Court. In the course of this discussion, Tammy asserts, *inter alia*, that under Mississippi law, the courts, "when determining whether a dispute is subject to arbitration . . . must first ask (1) whether the parties had a valid agreement in arbitration and (2) whether the specific dispute falls within the substantive scope of that agreement." Tammy undergirds this statement by citing our decision in *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002). Tammy also cites *Thomson-CSF, S.A. v. American Arbitration Association*, 664 F. 3d 773, 776 (2nd Cir. 1995), which stated:

> Arbitration is contractual by nature—"a party cannot be required to submit to arbitration any

> dispute which he has not agreed so to submit." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960). Thus, while there is a strong and "liberal federal policy favoring arbitration agreements," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985) (quotations omitted), such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract.

*Id.* at 776.

Captain D's likewise states, "[w]hen evaluating a motion to compel arbitration it must be shown that a valid agreement to arbitrate exists and whether the dispute in question falls within the scope of that arbitration agreement. *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F. 3d 1069, 1073 (5th Cir. 2002)."

This Court's decision in today's case follows on the heels of our recently-decided opinion in *Rogers-Dabbs Chevrolet-Hummer v. Blakeney*, 950 So. 2d 170 (Miss. 2007). In *Rogers-Dabbs*, we once again set out the well-established responsibility of the courts when confronted with arbitration issues by stating that the courts must first determine whether the parties have agreed to arbitration of the dispute and if it is determined that they have, then a determination must be made as to "whether legal constraints external to the parties' agreement foreclosed arbitration of those claims." *Id.* at 173 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)). *See also East Ford*, 826 So. 2d at 713.

Since our decision today turns on the first prong (whether the parties agreed to arbitrate the dispute), we focus only on this prong. As we have noted on prior occasions, this first prong has two sub-factors: "(1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement." *Rogers-Dabbs*, 950 So. 2d at 173 (quoting *East Ford*, 826 So. 2d at 713)). In *Rogers-Dabbs*, the vehicle purchaser, Blakeney, executed various documents relating to the purchase, including an arbitration agreement wherein Blakeney agreed with the dealer, Rogers-Dabbs, to submit to arbitration "all claims, demands, disputes or controversies of every kind or nature between them arising from, concerning or relating to" the transaction, including negotiations, financing arrangements, extended warranties, performance of the vehicle, "or any other aspect of the vehicle and its sale, lease, or financing." *Id.* at 174. Blakeney eventually sued Rogers-Dabbs under several theories, asserting that the car dealer's employee(s) had engaged in a fraudulent scheme to use Blakeney's identity to obtain forged titles to stolen vehicles, resulting in Blakeney never receiving title to his vehicle. Rogers-Dabbs filed a motion to compel arbitration based on the arbitration clause in the consumer contract, and the trial court denied the motion to compel arbitration. On appeal, we affirmed the trial court's denial of the motion to compel arbitration. This Court found that the parties' dispute "was not within the scope of the arbitration agreement." *Id.* at 178. In reaching this conclusion, the Court stated that while the purchaser no doubt had agreed to arbitrate claims originating from (or relating to) the sale of the vehicle, "no reasonable person would agree to submit to arbitration any claims

[taking the claims as alleged to be true for the sake of argument] concerning a Hummer to which he would never receive a title; a scheme of using his name to forge vehicle titles and bills of sale to sell stolen vehicles; and the commission of civil fraud against him by misappropriating his title to the Hummer he purchased and forging his name on fake titles and bills of sale on various stolen vehicles . . ." *Id.* at 177. Although we found the existence of a valid arbitration agreement, we found, on the other hand, that the dispute between the purchaser and dealer was not within the scope of the arbitration agreement. Thus, we found that the car dealer had failed to satisfy the first prong of *East Ford*, that being whether the parties had agreed to arbitrate the dispute. *Id.* at 176, 178.

Turning to the facts of today's case, Captain D's Employment Dispute Resolution Plan stated, *inter alia*:

> [B]oth Captain D's and I agree to settle any and all previously unasserted claims, disputes, or controversies arising out of or relating to my application for employment, employment and/or cessation of employment with Captain D's, exclusively by final and binding arbitration before a neutral Arbitrator. By way of example only, such claims include claims under federal, state and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Medical Leave Act, the law of contract and law of tort.

> I understand that if I do file a lawsuit regarding a dispute arising out of or relating to my application for employment, employment, or cessations (sic) of employment, Captain D's may use this Agreement in support of its request to the court to dismiss the lawsuit and require me to use arbitration.

Just as in *Rogers-Dabbs*, there is no fervent effort to attack the validity of the arbitration agreement which Tammy signed, other than the assertion of disaffirmance. Therefore, we quickly move to the first prong's second consideration—whether the parties' dispute is within the scope of the arbitration agreement. *Rogers-Dabbs*, 950 So. 2d at 176 (citing *East Ford*, 826 at 713)). In determining the scope of the arbitration agreement, "[c]ourts often characterize arbitration language as either broad or narrow." *MS Credit Ctr., Inc. v. Horton*, 926 So. 2d 167, 175 (Miss. 2006). The United States Supreme Court has found similar language—"any controversy or claim arising out of or related to"—to constitute a broad arbitration provision. *Smith Barney, Inc. v. Henry*, 775 So. 2d 722, 726 (Miss. 2001) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)). "Because broad arbitration language is capable of expansive reach, courts have held that it is only necessary that the dispute "touch" matters covered by the contract to be arbitrable." *Horton*, 926 So. 2d at 176 (internal quotation marks omitted). Further, "relate" means "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with; with "to." Black's Law Dictionary 892 (Abridged 6th ed. 1991).

The question of "scope" is narrowed to whether Tammy's rape claim arises out of or relates to "[Tammy's] application for employment, employment, and/or cessation of employment with Captain D's," so as to subject Tammy's sexual assault claim to arbitration. While recognizing the breadth of the language in the arbitration provision, we unquestionably find that a claim of sexual assault neither pertains to nor has a connection with Tammy's employment.

In sum, we find that Tammy's sexual assault claim against Captain D's and its employee is clearly not within the scope of the arbitration agreement; therefore, Captain D's "fails to satisfy the first prong of *East Ford* (whether the parties have agreed to arbitrate the dispute)." *Rogers-Dabbs*, 950 So. 2d at 178. Likewise, as we found in *Rogers-Dabbs*, our action today does not offend the Federal Arbitration Act by remanding this case for a full trial on the merits of the case. *Id.*

For the reasons stated, we find this issue to have merit, and since this issue is dispositive, we deem it unnecessary to address the other issues raised on appeal.

## CONCLUSION

For the reasons stated, the Alcorn County Circuit Court's judgment compelling Tammy to arbitration and dismissing her claims is reversed, and this case is remanded to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

SMITH, C.J., WALLER, P.J., EASLEY, RANDOLPH AND LAMAR, JJ., CONCUR. DIAZ, P.J., AND GRAVES, J., CONCUR IN RESULT ONLY. DICKINSON, J., DISSENTS WITH SEPARATE WRITTEN OPINION.

DICKINSON, JUSTICE, DISSENTING:

After much discussion with my fellow justices comprising the majority concerning our respective views in this case, and after carefully reexamining my own view, I unfortunately find it impossible to withhold this dissent. This is so, even though my disagreement with the majority's conclusions is slight. The majority and I are in agreement that Tammy Smith and Captain D's entered a valid, binding arbitration agreement. There were no other issues raised by the parties and briefed to the trial court or to this Court on appeal. Thus, the majority today takes the unusual step of deciding an interlocutory appeal on an issue never raised or briefed by either party, and not discussed by the trial court. ¶22. My disagreement with the majority may be summarized as follows: The majority correctly concludes that Tammy must submit her claims to arbitration if they "arise out of or relate to her employment." However, the majority then decides (apparently as a matter of law) that Tammy's claims do not relate to her employment. It is my view that we don't know whether they do or not because the issue (which I believe to be fact-intensive) was never raised with the trial court,[6] and

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[6] Tammy raised three issues with the trial court in opposition to Captain D's motion to compel arbitration. She claimed (1) that the Mississippi Arbitration Act did not apply to minors; (2) that her grandmother, Pat Spencer, (who co-signed the

was neither raised nor briefed here.[7] Thus, I respectfully dissent from the majority's disposition of this case, and would instead remand the case for an evidentiary hearing.

Tammy, who was an employee of Captain D's, alleges that her employer was negligent in hiring, supervising, and retaining her manager, Christopher Howell, and that she was assaulted by her manager at the restaurant.

I think it important to note here that, in its zeal to separate what it calls "Tammy's rape claim" from the scope of her arbitration agreement, the majority fails to absorb the fact that Tammy filed no "rape claim" against Captain D's. Her claim against Captain D's (as the majority recognizes and states elsewhere in its opinion) is for "negligent hiring, supervision, and retention" of her manager, Howell.[8] Thus, this Court is not really being called upon today (as the majority asserts) to decide "whether Tammy's rape claim arises out of or relates to" her employment.

---

arbitration agreement) did not hold the status of plaintiffs guardian; and (3) that the cost of arbitration was prohibitive.

[7] The trial judge granted Captain D's motion to compel arbitration. Tammy filed an interlocutory appeal with this Court, raising the issues of (1) whether a minor may disaffirm an arbitration agreement; (2) whether the arbitration agreement was unconscionable; and (3) whether Captain D's should be prevented from compelling arbitration after asserting the affirmative defense of "exclusive remedy" under the Workers Compensation Act. In her order, Judge Aycock stated it was "apparent Plaintiff's real contention is that Plaintiff, due to her minority status, should not be bound by the arbitration agreement."

[8] Tammy did, of course, file a "rape claim" against Howell (the perpetrator). However, neither Howell nor Tammy's rape claim against him is before us.

As stated, there is no dispute that Tammy is bound by the arbitration agreement. Therefore, she must submit her claims against Captain D's to arbitration if they "arise out of or relate to" her employment. In her efforts before the trial court (and before this Court) to avoid arbitration, Tammy argued only that she was not bound by the agreement. She neither stated nor implied that she should not be required to arbitrate because her claims did not relate to her employment.[9]

Footnote 1, supra, specifically lists Tammy's three arguments, none of which even hint that Tammy takes the position that her claims do not relate to her employment. The majority, realizing that the issue has not been raised, skillfully and smoothly claims to "restate the critical issue for clarity in discussion." I'm not sure I know what this means, but I am sure that it would be inaccurate to conclude that the majority's deciding issue somehow flowed from the issue raised before this Court.

Not only was the issue never raised nor briefed by any of the parties, but it seems to me its resolution requires an examination of the facts—an examination never conducted by the trial court or the majority. The trial court never examined the facts because the trial court was presented with no facts on the issue to examine. This Court, of course, never examined the facts because we were placed by the

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[9] It could be argued that Tammy's claims against Captain D's so clearly relate to her employment that Tammy's counsel didn't even bother raising the issue with the trial court or here. One would think if Tammy's counsel concluded the argument had any merit whatsoever, it would have at least been raised and argued.

parties in the same position as the trial court, that is, we were given no facts to examine.

All we are told about Tammy's claim is that she alleges in her complaint "Mil or about February 18, 2004, at approximately 10:00 a.m., at the Captain D's restaurant . . . Howell, while in the scope and scope of his employment injured the plaintiff, Smith, by willfully and intentionally assaulting and raping her on the restaurant premises in the women's restroom." Tammy's complaint further alleges that Captain D's should be held responsible for damages because it negligently hired Howell as a supervisor and failed to properly monitor and supervise him. More significantly, Tammy claims that "Captain D's had a duty to supervise employee, Howell, when he dealt with the public and with fellow employees."

In my view, there are many unaddressed factual questions which bear on the issue of whether Tammy's claims against Captain D's of negligent hiring, retention, and supervision of Howell relate to her employment. For instance, we do not know (1) whether the restaurant was open for business, or was closed with the doors locked, with only employees (perhaps only Tammy) locked inside with the manager; (2) whether Tammy was working at the time, and thus was required (as an employee) to be on the premises and under Howell's supervision and control; (3) whether Howell, in his capacity as manager, ordered Tammy to go to the restroom for some pretextual reason, such as to take toilet paper or paper towels; (4) whether customers or other employees were present in the restaurant or in the rest room at the time of the incident; or (5) whether Tammy failed to stop the assault out of fear of losing her job.

It seems to me important for the trial court to address these and many other factual questions. For instance (and only by way of hypothetical example), suppose the facts revealed that:

> Tammy reported for work at 9:30 on the day in question, and that the restaurant was not open to the public. No employees other than Tammy and Howell were present. While Tammy was preparing to open the restaurant, Howell (as Tammy's manager) ordered her to fill the paper towel dispenser in the Ladies' restroom. Tammy complied with her manager's order and went into the restroom, and the manager then followed her in and began to assault her. When Tammy attempted to resist, Howell, threatened to fire her if she resisted further, or if she reported the incident. And even though Captain D's was aware that Howell had done the same thing at other restaurants in the past, it hired him anyway.

I wish to emphasize that *we have no reason to believe that any of these things happened*, but neither do we have any reason to know that they didn't. We just don't know, and neither did the trial judge. Under the above hypothetical facts, it could hardly be argued with credibility that Tammy's claim is not "related to" her employment since it was because of her employment that she was present in the store with the doors locked, and was subject to the manager's orders and threats.

On the other hand, it could be that Tammy was not working, but just stopped by to get something to eat and Howell, seeing her go into the restroom, followed her in and assaulted her. Again, this is a hypothetical, and we have no reason to believe that the

assault alleged by Tammy happened this way. But if it did, it would be difficult to argue that the assault was related to Tammy's employment.

I firmly believe this matter should be remanded to the trial court for an evidentiary hearing and a determination of whether Tammy's claims against Captain D's relate to her employment. If the trial court, after reviewing the evidence submitted by the parties, concludes that they do, this case should be settled in arbitration. If it does not, then the matter should proceed to trial in the circuit court.

Because the majority decides this appeal on an issue never raised; ignores the need for a factual determination; and simply decides as a matter of law that Tammy's claims do not relate to her employment, I respectfully dissent.

## APPENDIX B

IN THE CIRCUIT COURT OF ALCORN COUNTY, MISSISSIPPI

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CIVIL ACTION NO. CV04-281(A)A

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TAMMY SMITH BY AND THROUGH HER FATHER & NEXT FRIEND, ALVIN CHRISTOPHER SMITH,
*Plaintiff*

versus

CAPTAIN D'S, LLC AND CHRISTOPHER LEE HOWELL.
*Defendants*

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### OPINION

THIS CAUSE having come before the Court on the motion of Captain D's, LLC, to dismiss the Plaintiff's Complaint against Captain D's, LLC, and to compel arbitration. The Court having considered said motion; having heard arguments of counsel; and being otherwise fully advised in the premises, finds that the motion is well-taken and that it should be GRANTED.

### THE FACTS

The facts of this case are essentially not in dispute. The Plaintiff Tammy Smith was seventeen years old when she moved in with her grandparents in July 2003. She was living with her grandparents in February 2004 when she sought employment with Captain D's restaurant in Corinth, Alcorn County, Mississippi. She completed an employment application and executed an "Employee Dispute Resolution Plan" which contained a binding arbitration clause. Plaintiff's grandmother, Mrs. Spencer, also signed

the document. There was little, if any, discussion regarding the Employee Dispute Resolution Plan at the time of the execution. On February 18, 2004, Plaintiff was raped by the store manager at the restaurant location.

Plaintiffs counsel initially contended Tammy Smith did not execute the agreement, that Plaintiff's grandmother did not hold the status of Plaintiff's guardian and raised objections to the cost of arbitration. However, after considerable argument, oral and by brief, it is apparent Plaintiff's real contention is that Plaintiff, due to her minority status, should not be bound by the arbitration agreement.

THE LAW

Congress has declared a national policy in favor of arbitration. *Phearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983); *Dean Whitter Rentals. Inc. v. Bryd*, 470 U.S. 213 (1985). Likewise, our Mississippi Supreme Court has adopted many cases favoring arbitration. "The case law in Mississippi regarding arbitration and the Federal Arbitration Act are consistent with one another." *Smith Barney. Inc. v. Henry*, 775 So. 2d 722 (Miss. 2001); *also see Hutto v. Jordan*, 204 Miss. 30, 36 So. 2d 809, 812 (Miss. 1948). The Federal Arbitration Act does not exclude minors from its application. Federal substantive law of arbitrability must be applied in state court proceedings involving the Federal Arbitration Act. *See Southland Corporation v. Keatings*, 465 U.S. 116 (1984), 104 S.Ct. 852, 861, 79 L. Ed. 2d, 1, 15, fn.10; *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985), 627 105 S. Ct 3346, 3354, 87 L. Ed, 2d 444, 455-456.

The Plaintiff contends Mississippi law specifically prohibits a minor from submitting to arbitration. The Defendant argues that the Federal Arbitration Act controls and a minor in Mississippi should not be allowed to disaffirm an arbitration clause by asserting infancy. Counsel for both parties advised the Court no Mississippi cases have been decided on whether minors can disaffirm an arbitration clause based on the "infancy doctrine". Clearly, it is well settled in Mississippi that contracts with infants impose no liability on them which is not voidable at their election. *Lott Mellott v. Love*, 119 so. 2d 913 (Miss. 1929); *Ferguson v. Bobo*, 54 Miss. 121 (Miss. 1876); *Bell v. Smith*, 124 So. 331 (Miss. 1929); *Star Chevrolet Co. v. Green by Green*, 473 So. 2d 157 (Miss. 1985).

While Mississippi has not decided the legal issue of whether a plaintiff's status as a minor is a sufficient challenge to arbitration, other state courts have determined minors cannot disaffirm an arbitration clause. *Sheller v. Franks Nursery and Crafts, Inc.*, 957 Fed. Supp. 150 (N. D. Ill. 1997). The Illinois infancy law is akin to Mississippi's infancy law and states, "The general rule applicable to all contracts, other than for necessaries, is that the contract of a minor is voidable and may be repudiated by the minor during minority or within a reasonable time upon achieving majority absent a ratification." *Sheller* at 153. The Illinois Court reasoned that "the privilege of minority . . . . is to be used as a shield and not as a sword." That is, "after disaffirmance, the infant is not entitled to be put in a position superior to such a one as he would have occupied if he had never entered into the voidable agreement." The minor "is not entitled to retain an advantage from a transaction which he repudiates." *Id.* A Pennsylvania Court in

*Doyle v. Giuliucci*, reasoned a minor is a beneficiary of such an agreement because it enables the minor to obtain employment which would be unavailable unless the minor agreed to resolve differences through an arbitration agreement. *Doyle v. Giuliucci*, 401 P.2d 1 (1965). Indeed, our Mississippi Courts have aligned itself with a similar limited application of the infancy law doctrine. *See Star Chevrolet Co. v. Green*, 473 So. 2d 157 (Miss. 1985). (Holding, minor may not use infancy, which is a shield for protection, as a sword for attack; such conduct by a minor amounts to fraud); *Also see Evans v. Morgan*, 12 So. 270 (Miss. 1891).

Plaintiff further claims the arbitration clause is unenforceable because it is procedurally and substantively unconscionable. Arbitration agreements are not per se inherently unconscionable. *East Ford Inc. v. Taylor*, 826 So. 2d 709, 714 (Miss, 2002). Procedural unconscionability may be proved by showing "a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms." *Id.* at 714. The Plaintiff is charged with reading the contract. *Washington Mut. Finance Group, LLC v. Bailey*, 364 F.3d 260, 265 (5th Cir. 2004). In Mississippi, a person is charged with knowing the contents of any document that he executes. *J.R. Watkins Co. v. Runnels*, 252 Miss. 87, 96, 172 So. 2d 567, 571 (Miss. 1965). "A person cannot avoid a written contract which he has entered into on the ground that he did not read it or have it read to him." *Id.* In the subject case, the minor, accompanied by her grandmother, are presented the contract which contains the arbitration clause. The Employee Dispute Resolution Plan

consists of one page (6 paragraphs). In plain language and conspicuous print it explains that if there is a dispute involving employment, Captain D's can use the agreement to ask a court to dismiss a lawsuit and require plaintiff to use arbitration. Mrs. Spencer's presence and signature would indicate her guardian status as well as her voluntary, but necessary, consent. Plaintiff testified that she loves to read and makes good grades. If she had read the agreement and did not understand the agreement she was obligated to ask questions before signing. She testified she asked no questions. It is disingenuous to claim that the document was complex if she made no attempt to read the agreement. Substantive unconscionability is shown by oppressive terms of the agreement. *Rusell v. Performance Toyota, Inc.*, 826 So. 2d 719 (Miss. 2002); *East Ford*, at 714. The facts in this case do not rise to one of substantive unconscionability.

The Mississippi Supreme Court has recently compelled arbitration when the defenses of unconscionability, contracts of adhesion, and lack of meaningful choice were raised. *See Northwest Financial Mississippi, Inc. v. McDonald*, 2005 WL 67487, pages 11-23 (Miss.2005).

> Borrowers' arbitration agreements with lenders were not shown to be procedurally and substantively unconscionable, despite claims that they were adhesion contracts and the borrowers lacked a meaningful choice; each borrower signed a single-page arbitration agreement written in plain language, the borrowers did not claim that they were unable to read or that they asked anyone to explain arbitration, they simply stated that no one informed them that they were sign-

ing an arbitration agreement or told them what an arbitration was, any reasonable person would know that the right to a jury trial was waived, and the borrowers submitted no evidence that they could not get a competitive loan from another company or that could not do without the loan.

In enacting § 2 of the Arbitration Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. *IP Timberlands Operating Co., Ltd. v. Denmiss Corp.*, 726 So. 2d 96 (Miss. 1998), quoting *Southland Corp. v. Keating*, 465 U.S. 1 (1984)

CONCLUSION

Notwithstanding the well settled Mississippi Law of the doctrine of infancy and our state's adherence to the protection of minors, this Court is of the opinion that minors who execute arbitration clauses should not be able to disaffirm those agreements. Practically speaking, thousands of our Mississippi youth are employed by nationally known publically traded and private employers, many of which utilize arbitration agreements. The minors receive a benefit, i.e. employment and compensation, that they should not later be allowed to disavow. Opportunities exist for employment that do not require the execution of an arbitration agreement. In light of our proclaimed federal and state courts' preference for arbitration, Tammy Smith should not be allowed to disaffirm the arbitration clause that she voluntarily signed and for which she received full benefits even though she did not read the agreement nor ask any questions regarding it meaning. Arbitration does not preclude

recovery for the Plaintiff, rather, merely selects her forum.

IT IS, THEREFORE, ORDERED AND ADJUDGED that all claims made by the Plaintiff in her Complaint against Captain D's, LLC, shall be submitted to binding arbitration in accordance with the terms of the arbitration agreement entered into by the Plaintiff with Captain D's, LLC, and that the Alcorn County Circuit Court action shall be dismissed accordingly as to Captain D's, LLC. The claims by the Plaintiff against separate Defendant, Christopher Lee Howell, for independent liability on his part, if any, are not subject to this order.

ORDERED AND ADJUDGED, THIS, the 13th day of December, 2005.

/s/ Sharion Aycock
SHARION AYCOCK
Circuit Court Judge

## APPENDIX C

SUPREME COURT OF MISSISSIPPI
Court of Appeals of the State of Mississippi
*Office of the Clerk*

Betty W. Sephton
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39205-0249
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September 13, 2007

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 13th day of September, 2007.

Supreme Court Case # 2006-CA-00024-SCT
Trial Court Case # CVO4-281AA

Tammy Smith by and through Her Father & Next Friend, Alvin Christopher Smith v. Captain D's, LLC

Motion for rehearing filed by appellee is denied. Dickinson, J., would grant.

* NOTICE TO
CHANCERY/CIRCUIT/COUNTY COURT CLERKS *

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

[Received SEP 17, 2007]

## APPENDIX D

CONSTITUTION OF THE UNITED STATES

Article VI.
Debts Validated—Supreme Law of Land—
Oath of Office

**Clause 2. Supreme Law of Land**

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Current through P.L. 110-131 approved 11-30-07

## APPENDIX E

### AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

# APPENDIX F

## UNITED STATES CODE

Title 9.—Arbitration
Chapter 1.—General Provisions

### § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 670.)

Current through P.L. 110-131 approved 11-30-07

## APPENDIX G

### CAPTAIN D'S EMPLOYMENT DISPUTE RESOLUTION PLAN

I recognize that differences possibly may arise between Captain D's, LLC and me during my application or employment with Captain D's. I recognize that it is in the interest of both Captain D's and me that disputes be resolved in a manner that is fair, private, expeditious, economical, final and less burdensome or adversarial than court litigation. Captain D's has an effective Internal Complaint Procedure, and I will try to take advantage of it where feasible. I understand, however, that not all issues can be resolved using the Internal Complaint Procedure.

Except as set forth below, both Captain D's and I agree to settle any and all previously unasserted claims, disputes, or controversies arising out of or relating to my application for employment, employment and/or cessation of employment with Captain D's, exclusively by final and binding arbitration before a neutral Arbitrator. By way of example only, such claims include claims under federal, state and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Medical Leave Act, the law of contract and law of tort.

I understand that if I do file a lawsuit regarding a dispute arising out of or relating to my application for employment, employment, or cessations of employment, Captain D's may use this Agreement in support of its request to the court to dismiss the lawsuit and require me to use arbitration.

I understand that I still may exercise my rights under the National Labor Relations Act and file charges with the National Labor Relations Board. I further understand that I still may file administrative charges with the Equal Employment Opportunity Commission or similar federal, state or local agency, but that upon receipt of a right-to-sue letter or similar administrative determination, I shall arbitrate any claim that I may have against Captain D's.

I understand that I must file a claim under the Captain D's Employment Dispute Resolution Plan within the federal or state statute of limitations period most applicable to your claim. I further agree that if I commence an arbitration, it will be conducted in accordance with the "Captain D's Employment Dispute Resolution Plan."

I understand that neither this Agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Captain D's and me. I further understand that my signature to this Agreement in no way guarantees that Captain D's will offer me employment. If Captain D's does offer me employment and I become employed at Captain D's, this Agreement in no way alters the "at-will" status of my employment. I understand that my employment, compensation and terms and conditions of my employment can be altered or terminated, with or without cause, and with or without notice, at any time, at the option of either Captain D's or myself. I understand that no General Manager, other store manager, or representative of Captain D's, other than an Officer of Captain D's at the level of Vice-President or above, has any authority to enter into any agreement for employment for any specific duration, to make any agreement contrary to the foramina

or to after the Captain D's Employment Dispute Resolution Plan.

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Social Security No.: 428-59-5975
Applicant/Employee Signature: /s/ Tammy Smith
Month: Feb Day: 3 Year: 2004
Name (Printed): Tammy Smith

In addition to the Applicant/Employee. If Applicant/Employee is under 18 years of age,a Parent or Guardian must sign below.

Parent or Guardian Signature: /s/ Pat Spencer
Month: Feb Day: 3 Year: 2004
Name (Printed): Pat Spencer

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**APPENDIX H**

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

[Filed JUL 6 2007]

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Case No. 2006-CA-00024-SCT

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TAMMY SMITH BY AND THROUGH HER FATHER &
NEXT FRIEND, ALVIN CHRISTOPHER SMITH
*Plaintiff/Appellant*

vs.

CAPTAIN D'S, LLC AND CHRISTOPHER LEE HOWELL
*Defendant/Appellee*

---

On Appeal from the Circuit Court of
Alcorn County, Mississippi; Cause No. CV04-281AA

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MOTION OF APPELLEE CAPTAIN D'S, LLC
FOR REHEARING

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## MOTION FOR REHEARING

NOW COMES Captain D's, LLC (hereinafter "Captain D's"), Appellee herein, by counsel, and, due to specific errors of law and/or fact which this Court either overlooked or misapprehended in its original opinion, moves for rehearing.

I. Relevant Background

This appeal was taken by Tammy Smith (hereinafter "Smith") from a ruling by the Circuit Court of Alcorn County, Mississippi, dismissing Smith's circuit court suit and compelling her to submit claims she filed against her employer, Captain D's, to arbitration consistent with an arbitration agreement Smith entered into in connection with her employment with Captain D's. On appeal, Smith asserted three distinct defenses to arbitration:

1. First, Smith asserted she could disavow the arbitration agreement based on her status as a minor;
2. Secondly, she argued the arbitration agreement was unconscionable; and
3. Thirdly, she contended that arbitration had been waived by Captain D's assertion of an alternative defense.

*See* Smith's "Statement of the Issues" at p. 1 of Brief of Appellant.

On June 14, 2007, this Court reversed the decision of the trial court, reinstated Smith's circuit court suit, and remanded the case on the merits. Though finding that Smith and Captain D's struck a valid, binding agreement to arbitrate, the majority of the Court concluded that Smith's claims against Captain D's were not within the scope of the arbitration agreement,

finding they did not "arise out of her employment." Justice Dickinson dissented from the majority with a separately written opinion in which he aligned himself with the majority in finding that a valid, binding agreement existed but refused to evaluate the scope of the arbitration agreement because 1) the defense had never been raised or briefed at the trial court or on appeal; and 2) the defense wholly depended on facts not before the Court.

Captain D's respectfully urges the Court to reconsider its ruling, which constitutes a significant departure from settled law and, if allowed to stand, would significantly change the law regarding appellate issues in general and arbitration issues specifically. The particular errors in the Court's ruling are as follows:

1. The ruling disregards or ignores the procedural bar to issues not raised by an appellant before the trial court, departing from *stare decisis*;

2. Closely related to #1, the Court either overlooked or misapprehended Smith's admission that her dispute fell within the scope of the arbitration agreement.

3. The ruling eliminated or unreasonably relaxed the burden of proof of the party contesting arbitration in violation of the Federal Arbitration Act ("FAA"); and

4. The Court misapprehended the true nature of Smith's claims against Captain D's because of facts not before the Court.

For these reasons, as demonstrated below, Captain D's submits that the original opinion of the Court

should be withdrawn and replaced by an opinion affirming the holding of the trial court.

II. The Court Ignored the Procedural Bar and Either Overlooked or Misapprehended Smith's Assertion to the Trial Court That Her Dispute Arose Out Of Or In Course Of Her Employment With Captain D's

*Stare decisis et non quieta movere*: security and certainty require that accepted legal principle not be unsettled.

The decision by this Court is a dramatically consequential one, considering that an otherwise pedestrian arbitration case has singularly uprooted the legion of cases holding that appellants will not be heard to assert a claim—or raise a defense—or seek resolution of an issue—which was not raised at the trial court. Making this ruling all the more unique is that a defense to arbitration was raised and tried sua sponte by the Court without being raised at any time by the party who had the burden of raising the defense and proving entitlement to it.

More specifically, the Court took Smith's three defenses to arbitration and, it is respectfully submitted, improperly recast them as a challenge to the scope of the arbitration agreement. It is worth noting at this point two basic facts: 1) Smith never challenged the scope of the arbitration agreement; and 2) Smith took the position at the trial court level that her claims against Captain D's were within the scope of the arbitration agreement.

The parties and the Court were blessed in this case with an ample record. Captain D's originally responded to Smith's lawsuit by moving to dismiss it and to compel the claims to arbitration. (C.P. 17).

Smith filed her initial objections to arbitration, resisting it on the grounds: 1) that she did not execute the agreement; 2) that she was not bound by the agreement; and 3) that the costs of arbitration were objectionable. Smith later clarified that she was not denying that she actually executed the arbitration agreement but rather disputed she was bound by it due to her status as a minor. (C.P. 63). Smith then moved to compel discovery to develop her objections, and the trial court granted Smith's request for discovery on her two narrow objections: 1) her entry into the arbitration agreement as a minor; and 2) the costs associated with the arbitration agreement. (C.P. 117). Smith's "waiver" defense did not appear until her appeal. Discovery ensued and supplemental briefs were submitted by both parties to supply the trial court with the benefit of the arbitration-related discovery. (C.P. 123 and 305).

In her supplemental brief to the trial court, Smith unequivocally proclaimed:

> *But for the intentional tort exclusion, this case would fall under the Workers' Compensation Act.*

(C.P. 305 at p. 7; Appendix 1) (emphasis added). Needless to say, for a claim to "fall under the Workers' Compensation Act" it must "arise out of and in the course of employment." Miss. Code. Ann. § 71-3-7. Much more, then, than simply not contesting that her claims fell outside the scope of the arbitration agreement, Smith actually asserted to the trial court that her claims "arose out or' her employment—a position totally consistent with not challenging the scope of the agreement. As the subject arbitration agreement unambiguously covered all "claims, disputes, or controversies *arising out of or relating to [Smith's] employment . . . with Captain's D's*," (R.E. 1)

there was never a case or controversy concerning the scope of the agreement.

That notwithstanding, the Court found, without the benefit of any facts, that Smith's "sexual assault claim *against Captain D's and its employee* is clearly not within the scope of the arbitration agreement." ¶ 17 (emphasis added).1 This holding demonstrated an unprecedented expansion of appellate review. No other pronouncement of law has been indoctrinated into the law more than the rule that an issue not raised before the lower court and only raised for the first time on appeal is deemed waived and procedurally barred. *Cooper v. Lawson*, 264 So.2d 890, 890 (Miss. 1972); *Harbin v. Chase Manhattan Bank*, 871 So. 2d 764, ¶ 6 (Miss. App. 2004).

In *Waters v. Gnemi*, 907 So. 2d 307 (Miss. 2005), this Court wrote:

> We have been consistent in holding that we need not consider matters raised for the first time on appeal, which practice would have the practical effect of depriving the trial court of the opportunity to first rule on the issue, so that we can then review such trial court ruling under the appropriate standard of review. If we were to adopt such a practice of considering for the first time on appeal matters not raised before the trial court, such practice would have the chilling effect of depriving the trial court of the opportunity to

---

[1] This statement reflects a critical misapprehension of the claims against Captain D's. Smith states no "sexual assault claim" against Captain D's, only against its employee, Christopher Howell, who did not assert a right to arbitration. Smith's claims against Captain D's are "negligent hiring, supervision and retention."

> first rule on the issue, which would then deprive this Court of the opportunity to perform our mandated appellate review by utilizing the appropriate standard for review of the trial court's ruling.

*Waters*, 907 So. 2d at ¶39.

In *Leverett v. State*, 197 So. 2d 889 (Miss. 1967), it was said:

> The Supreme Court is a court of appeals, it has no original jurisdiction; it can only try questions that have been tried and passed upon by the court from which the appeal is taken. Whatever remedy appellant has is in the trial court, not in this court. This court can only pass on the question after the trial court has done so.

*Leverett*, 197 So. 2d at 890 (quoting *Collins v. State*, 159 So. 865 (1935)).

That *de novo* review is applied to grants or denials of arbitration does not limit that principle. In *Gulf Ins. Co. v. Neel-Schaffer*, an arbitration-related case in which the Court also exercised *de novo* review, Justice Carlson, writing for the majority, addressed a party's opposition to arbitration on grounds raised for the first time on appeal by firmly stating:

> Finally, Neel-Schaffer makes several arguments based upon principles of equity, estoppel and unconscionability. These are procedurally barred and without merit. *As to substantive unconscionability, this issue is procedurally barred based on the fact that it is raised for the first time during this appeal.*

*Gulf Ins. Co. v. Neel-Schaffer*, 904 So. 2d 1036, ¶32 (Miss. 2004) (emphasis added).

In *Speedee Cash of Mississippi, Inc. v. Williams*, this Court, reviewing a trial court's denial of arbitration under the de novo standard, devoted a special section of the opinion to the matter of preserving defenses to arbitration, writing:

> In the appellee's brief presented to the Court, Williams makes a claim of unconscionability, and Speedee Cash responds to this claim in its appellant's reply brief. *However, there is absolutely nothing in the record to show that this claim was raised before the circuit court. The only claims in Williams' complaint are those of wrongful repossession, conversion, etc. Unconscionability is not mentioned.* While there is a notice of hearing on Speedee Cash's motion to compel arbitration, there is no transcript of a hearing. While Speedee Cash filed a memorandum in support of its motion to compel, Williams never filed a response. Finally, the circuit court's order denying Speedee Cash's motion to compel arbitration is a summary order and offers absolutely no rationale for the circuit court's decision. *Therefore, we must treat the issue of unconscionability as one never presented to the circuit court and apply the procedural bar. See, e.g., Brewer v. State*, 819 So.2d 1169, 1175 (Miss.2002).
>
> *Because Williams raised no issues and offered no evidence to the circuit court as to why the arbitration agreement should not be enforced, we reverse the circuit court's denial of Speedee Cash's motion to compel arbitration.*

*Speedee Cash of Mississippi, Inc. v. Williams*, 915 So. 2d 1061, ¶ 6 and ¶ 7 (Miss. 2005) (emphasis added).

In the instant case, there was a departure from this settled law, eschewing the procedural bar altogether. The Court, instead, likened the instant case to the recently-decided opinion in *Rogers-Dabbs Chevrolet-Hummer v. Blakeney*, 950 So. 2d 170 (Miss. 2007) and, following a lengthy discussion of *Rogers-Dabbs*, arrived at the conclusion that Smith's claims were similarly not contemplated by the arbitration agreement. Absent from this discussion was a pivotal distinction between *Rogers-Dabbs* and this case. In *Rogers-Dabbs*, Justice Carlson listed at the outset of the Court's opinion the precise defenses asserted by Blakeney, the party resisting arbitration before the circuit court, as follows:

> *On the other hand, Blakeney asserts . . . that he did not agree to have claims involving identity theft and forgery resolved by arbitration inasmuch as such claims were not contemplated by the arbitration agreement*; that the FAA prerequisites are not satisfied; and that the arbitration agreement at issue is procedurally unconscionable.

¶6 (emphasis added).

The significant peril presented by the Court's decision to future litigants confronted with arbitration issues is that it requires parties who are seeking to preserve a trial court's grant of arbitration to anticipate (and thus brief) defenses not raised by the party resisting it. Smith did not challenge the scope of the arbitration agreement and Captain D's naturally did not devote briefing to the issue, yet the Court's analysis turned on the scope of the agreement. If the Court's decision is mandated, it stands to reason that it will unsettle and retool the landscape of arbitration law. Consider that there are two prongs to determin-

ing whether a dispute is subject to arbitration: 1) did the parties have a valid agreement to arbitrate; and 2) does the controversy fall within the substantive scope of the agreement. If, now, a party resisting arbitration does not contest the first prong (and perhaps, even confesses the first prong is met) but only challenges the second prong, must the party seeking to uphold arbitration regardlessly strive to disprove the validity of any defenses to the first prong where none has been raised? Respectfully, time-honored precedent does not support that.

What, too, is to made of the fact that "arbitration is contractual by nature." *See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960). If a party, such as Smith, does not contend her dispute is one which she did not agree to arbitrate, is it not a substitution of judgment and violation of the freedom to contract to make a contrary decision for her? The only reasonable conclusion that can be drawn from the fact that Smith's very capable attorneys did not make such a claim is because it was so clear to them that Smith did contract to arbitrate claims of the nature at issue. The undersigned was unable to find another decision by this Court where, when faced with such mutual assent, the Court altered the agreement of the parties.

The integrity and stability of our judicial system and even our broader society relies on settled principles of law—which have been hewed and formed and fashioned over time and then withstood the crucible of consistent application —remaining settled. *Stare decisis* has always been the preferred course of action for this Court. "Our application of *stare decisis* is necessary, *inter alia*, so that trial courts can make

correct decisions and lawyers can properly advise their clients." *United Services Auto. Ass'n v. Stewart*, 919 So.2d 24, ¶21 (Miss. 2005).

By invoking for Smith a defense to arbitration which was not raised or briefed (and which would constitute an about-face by Smith from her position at the trial court), Captain D's respectfully submits that the Court erred and, upon reconsideration of the matter, the trial court's grant of arbitration should be affirmed.

III. The Court's Decision Unreasonably Relaxed If Not Eliminated Altogether Smith's Burden of Proof

By holding as a matter of law that Smith's claims were not contemplated by the scope of the subject arbitration agreement, the Court rendered an opinion in conflict with established arbitration law and relaxed, if not eliminated, Smith's burden of proof.

The Court has consistently aligned itself with federal precedent in declaring that it "will respect the right of an individual or entity to agree in advance of a dispute to arbitration or other alternative dispute resolution." *MS Credit Center, Inc. v. Horton*, 926 So.2d 167, ¶20 (Miss. 2006) (citing *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 722 (Miss. 2002). "Indeed, it is not a matter of discretion since [the Court's] duty requires [it] to follow the law." *Id.* Consistent with this policy, doubts concerning 1) the scope of arbitration agreements and 2) asserted defenses are resolved in favor of arbitration. *Id.* A fortiori, it is an imperative that a party resisting arbitration on the ground that the subject claims are not arbitrable bears the burden of proving it. *Id.*

In *Norwest Financial Mississippi, Inc. v. McDonald*, 905 So.2d 1187 (Miss. 2005), this Court acknowledged where the burden of proof squarely lies:

> Additionally, the lenders do not have the burden to prove lack of unconscionability, as argued in the Parkerson concurring opinion. *The party resisting arbitration must shoulder the burden of proving a defense to arbitration.*

*McDonald*, 905 So.2d at 1193 (emphasis added); *see also Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 81, 121 S. Ct. 513, 517 (2000) (highest court holding that party seeking to invalidate an arbitration agreement bears the burden of proving that the claims are unsuitable for arbitration, pointing out that *"[t]he Court need not discuss how detailed such a showing would have to be, for in this case, there was no timely showing at all on the point."* (emphasis added)).

Perhaps one of this Court's strongest statements regarding the burden of proof which must be demonstrated by a party resisting arbitration on the grounds that claims are not arbitrable is found in *IP Timberlands Operating Co., Ltd. v. Denmiss Corp.*, 726 So.2d 96, ¶46 (Miss. 1998):

> Doubts as to the availability of arbitration must be resolved in favor of arbitration. Unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue, then a stay pending arbitration should be granted.

*See also Terminix Intern., Inc. v. Rice*, 904 So.2d 1051 (Miss. 2004), Russell, 826 So.2d at 722.

Here, Smith made no showing whatsoever regarding the scope of the arbitration agreement. At the

risk of repetition, the very nature of Smith's claims against Captain D's depend on them "arising out of her employment" with Captain D's; hence, her admission that "[b]ut for the intentional tort exclusion, this case would fall under the Workers' Compensation Act." As in *Norwest Financial Mississippi, Inc.*, Captain D's did not have the burden to prove Smith's claims were contemplated by the arbitration agreement, Smith had the burden to prove *they were not*—and she did not.

Even so, the subject arbitration agreement stipulated that "claims, disputes, or controversies arising out of or relating to [Smith's] . . . employment . . . with Captain's D's" would be arbitrated. Arbitration language which includes claims "related to" is characterized as broad language. "Because broad arbitration language is capable of expansive reach, courts have held that *'it is only necessary that the dispute "touch" matters covered by (the contract] to be arbitrable:"* *Horton*, 926 So. 2d at ¶25 (emphasis added) (quoting *Penzoil Exploration & Prod. Co. v. Ramco Energy, Ltd.*, 139 F.3d 1061, 1068 (5th Cir. 1998) (citing *Mississippi Fleet Card, LLC v. Bilstat, Inc.*, 175 F. Supp. 2d 894, 899 (S.D. Miss. 2001); *First Family Fin. Serv., Inc. v. Fairley*, 173 F. Supp. 2d 565, 570 (S.D. Miss. 2001); *Blount v. Nat'l Lending Corp.*, 108 F. Supp. 2d 66, 669 (S.D. Miss. 200); *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F. Supp. 2d 655, 657 (S.D. Miss. 2000).

As there is complete unanimity amongst the Court that Smith was bound by the arbitration agreement, her claims against Captain D's are arbitrable if they merely "touch" matters related to or arising out of her employment. Smith, though bearing the full weight of the burden of proof, did not suggest, imply, hint or

allude that her claims did not touch on matters related to or arising out of her employment. The Court's opinion, as it stands, relieved her of that legal imperative and created an issue where one did not exist.

Most surely, the Court did not intend to create a black-letter rule of law that "negligent hiring, supervision, and retention" claims against an employer are never arbitrable under an agreement which covers controversies "arising out of" or "related to" the subject employment. Since, however, those are the claims stated against Captain D's, without any further showing by Smith, is that not the precedential implication of the ruling? This is in conflict with the state of arbitration law across the country, even considering cases involving intentional acts such as sexual assault and the like. *See, e.g., Douglass v. Pflueger Hawaii, Inc.*, 135 P.3d 129, 139 (acknowledging parties did not dispute whether plaintiff's complaint fell within arbitration agreement, though suit included claims for "hostile, intimidating and/or offensive work environment," "unsafe working environment," "sexual assault and sexual discrimination," "negligent training of the supervisor," and "negligent supervision); *Kaddouri v. Merrill Lynch*, 2005 WL 283582, *6 (N.D. Tex. 2005) (compelling arbitration of claims by plaintiff against her employer for negligent retention, negligent training and negligent supervision of another employee accused of abusive conduct); *Ryan's Family Steak Houses, Inc. v. Regelin*, 735 So. 2d 454, 457 (Ala. 1999) (plaintiff compelled to arbitrate claims where seeking money damages against her employer for invasion of privacy, the tort of outrage, assault and battery, and negligent training and supervision, with all the claims stemming from sexually inappropriate conduct occurring in the work-

place); *Dantz v. American Apple Group, LLC*, 123 Fed. Appx. 702, 710 (6th Cir. 2005) (upholding arbitrability of claims by plaintiff against employer based on theories of unjust enrichment, sexual harassment, negligent retention, retaliation, promissory estoppel, breach of contract and spoliation of evidence); *Butcher v. Bally Total Fitness Corp.*, 2003 WL 1785027, *1 (Ohio App. April 3, 2003) (employee who brought action against her former employer for sexual harassment, sexual discrimination, hostile work environment, and negligent retention in the workplace required to submit claims to arbitration); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 701 (11th Cir. 1992) (employee who brought suit against employer alleging sexual harassment and seeking redress under state law theories of battery, intentional infliction of emotional distress, and negligent retention required to submit claims to arbitration).

The case of *Hill v. JJB Hilliard, W.L. Lyons, Inc.*, 945 S.W.2d 948 (Ky. App. 1996), stands out as a particularly well-reasoned approach to analyzing a strikingly similar fact pattern in the context of whether claims of this nature are arbitrable. There, Jane Hill ("Hill") was employed by Hilliard Lyons as a stockbroker, and, as a condition of her employment, Hill was required to enter into an arbitration agreement which provided that she agreed to submit to arbitration any dispute, claim, or controversy between Hilliard Lyons and herself "arising out of her employment." *Id.* at 949.

After going to work for Hilliard Lyons, Hill alleged she was raped by her supervisor, W. William Brab ("Brab"), while they were attending a convention in New York. *Id.* at 950. She further alleged that Brab threatened her that, if she told anyone of the inci-

dent, she would lose her job. Id. Subsequently, Hill filed a state court action against Hilliard Lyons, Brab, and certain officers and directors of Hilliard Lyons, claiming assault and battery, false imprisonment, intentional infliction of emotional distress, along with sexual harassment, retaliation, and violation of equal pay laws. *Id.* All defendants collectively moved to dismiss and defer the case to arbitration. *Id.* Notably, Hill *resisted* arbitration at the trial court level on the grounds her claims did not "arise out of her employment." *Id.* The trial court, *after considering oral arguments* on Hills defense to the scope of the arbitration agreement, found that all of her claims arose out of her employment with Hilliard Lyons and compelled her to arbitrate. *Id.*

On appeal, the Kentucky appeals court cogently distinguished Hill's claims against her employer for sexual harassment, retaliation, and violation of equal pay laws from Hill's claims against Brab for the sexual assault. The claims against the employer were found to "arise out of her employment" and were compelled to arbitration, while the claims against the employee for sexual assault were reinstated in the state court action. *Id.* at 951. In other words, the *Hill* Court, resisted lumping Hill's claims against her employer with the sexual assault claim against her co-worker and treated the separate claims on their own merit. This, Captain D's submits, underscores a point of error in the original opinion of the Court, which on more than one occasion inaccurately treated Smith's claims against Captain D's as a "sexual assault claim," when, unquestionably, Smith made no such claim against Captain D's.

## IV. The Nature of Smith's Claims Were Misapprehended Because of Insufficient Facts Before the Court

Though Captain D's submits Smith has waived any right to challenge the scope of the arbitration agreement, the law requires that, even when the scope of the arbitration agreement is placed in doubt, the presumption in favor of arbitration can be overcome only with "clear *evidence* that the parties did not intend the claim to be arbitrable." *Harvey v. Joyce*, 199 F.3d 790, 793 (5th Cir.2000) (emphasis added) (citing *Moses H. Cone Memorial Hosp. v. Mercury Const.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed.2d 765 (1983)). Without rehashing Smith's waiver of any challenge to the scope of the subject arbitration language, evidence in the form of facts are required to decide the issue, as Justice Dickinson's dissent correctly appraises.

The flip-side of Smith not contending that her claims against Captain D's do not arise out of or relate to her employment is that Captain D's was never afforded the opportunity to counter that attack and to make a record of it, resulting in something of an "appeal by ambush." *See generally Melendez v. Exxon Corp.*, 998 S.W.2d 266, 282 (Tex. App. 1999). At the trial court level and on appeal, Smith was effectively permitted to silence the facts and evidence demonstrating that her claims against Captain D's are inextricably related to her employment yet, at the same time, successfully challenge arbitration. Smith has been licensed to now go before a jury and present those same facts and that same evidence which, if they had been before the trial court or this Court in the first instance, would subject her claims to arbitration—*and there is no doubt that she will.* This is an

injustice to Captain D's and an affront to the FAA's stated preference in favor of arbitration.

Captain D's makes the following proffer of what the factual allegations would demonstrate concerning the central basis for Smith's claims against Captain D's:

> On February 18, 2004, Tammy Smith clocked in to work at the Corinth, Mississippi, Captain D's restaurant at or about 10:07 a.m.
>
> Two other Captain D's employees were at work as well—Christopher Howell (Smith's manager) and a cook.
>
> Smith clocked off of work that day at or about 5:09 p.m, working approximately 7 hours.
>
> Smith claims that during the morning of February 18th she had a sexual encounter with Howell in one of the restaurant bathrooms. According to one account Smith gave, Howell first asked Smith if she wanted to keep her job, and Howell then proceeded into the men's bathroom with Smith following behind him a few minutes later. Smith gave a second account to a Captain D's employee that she went into the ladies' bathroom and Howell came in while she was there. Smith gave a third account that Howell directed her to go into the ladies' bathroom and she complied. Regardless of which account is believed, Smith is consistent in her claim that these events occurred while she was on the job and working under the supervision and direction of Howell.
>
> Smith claims she had sex with Howell in the Captain D's bathroom because Howell allegedly told her she had to have sex with him in

> order to keep her job, and she felt compelled to do so for that reason.
>
> Smith claims that Captain D's negligently hired Howell and negligently allowed Howell to remain in a managerial role over Smith, asserting that Captain D's knew or should have known of Howell's propensity toward this sort of behavior.

Captain D's emphasizes that it denies liability and that these facts have not been weighed by the final arbiter of this case for credibility—only that these factual allegations form the basis of Smith's claims that Captain D's negligently placed Howell in a position of authority over her and negligently placed Smith under his direction, control and command while in Captain D's employment. Smith does not claim she was raped while a customer at Captain D's and by mere coincidence happened also to be an employee. Indeed, the duties she claims Captain D's owed to her were not as an invitee but as an employee. For a final time, recall her counsel's characterization that "[b]ut for the intentional tort exclusion, this case would fall under the Workers' Compensation Act." Even Smith acknowledged that, at a minimum, her dispute with Captain D's "touched" matters concerning her employment.

Indeed, the notion of rape shocks the senses, but in this search for the truth, the emotionally-charged claim of rape must be divorced from the separate legal basis for Smith's claims against Captain D's, which deserve separate treatment.

V. Conclusion

Wherefore, first and foremost, Captain D's submits there existed no case or controversy before this Court

regarding the scope of the subject arbitration agreement. Smith, as the party resisting arbitration, had the burden of raising and proving applicable defenses to arbitration. She never asserted at the trial level or on appeal that her claims against Captain D's did not fall within the substantive scope of the subject agreement. Smith, in fact, took the position before the trial court that her claim "arose out of and in the course of' her employment with Captain D's, eliminating any doubt that her claims touched on matters concerning her employment. The procedural bar should have precluded any consideration of this issue.

Moreover, Captain D's respectfully submits that even if the scope of the arbitration agreement was placed in doubt, it was error to relieve Smith of her burden of proving with "clear evidence" that her claims against Captain D's do not "touch" on matters concerning her employment. Because no facts were presented by Smith, it was a violation of the FAA and case law interpreting it for the Court to conclude as a matter of law that the subject scope of arbitration was narrower than Smith's claims.

Captain D's urges this Court to reconsider its original opinion and, because there was a valid, binding agreement to arbitrate, enter a ruling which affirms the decision of the Circuit Court of Alcorn County, Mississippi. Alternatively, Captain D's seeks remand for an evidentiary hearing on the question of whether Smith's claims against Captain D's fall within the scope of agreement to arbitrate.

RESPECTFULLY SUBMITTED, THIS, the 5th day of July, 2007.

CAPTAIN D'S, LLC

BY: /s/ Bradley F. Hathaway
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MSB NO. 10203
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CERTIFICATE OF SERVICE

I, Bradley F. Hathaway, attorney of record for Defendant/Appellee herein, do hereby certify that I have this day served via *U.S. Mail* a true and correct copy of the above and foregoing document to:

Honorable Sharion Aycock
Alcorn County Circuit Judge
P.O. Drawer 1100
Tupelo, MS 38802-1100

Duncan Lee, Esq.
DUNCAN LEE LOTT, P.A.
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John Ferrell, Esq.
FERRELL & MARTIN, P.A.
P.O. Box 146
Booneville, MS 38829

THIS, the 5th day of July, 2007.

/s/ Bradley F. Hathaway
BRADLEY F. HATHAWAY

86

No. 07-799

FEB 15 2008
CLERK

In The

# Supreme Court of the United States

CAPTAIN D'S, LLC,

*Petitioner,*

v.

TAMMY SMITH, by and through her father and next friend, ALVIN CHRISTOPHER SMITH,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Mississippi**

## BRIEF IN OPPOSITION

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## COUNTERSTATEMENT OF ISSUE

Where an agreement arbitration of all disputes that "arise out of or relate to" a worker's employment, and a State's highest court holds that the contract does not require arbitration of a worker's claim against her employer over her rape at the workplace, does the Federal Arbitration Act preempt that decision and require that her claims fall within the language of the contract as a matter of federal law?

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## INTRODUCTION

Petitioner Captain D's, LLC (hereinafter "Capt.") (a Mississippi seafood restaurant) requires all of its employees to sign a document agreeing to submit to mandatory arbitration any claims that "relate to" or "arise from" their employment. Tammy Smith, an employee of Petitioner, was raped by a fellow employee, and brought a lawsuit against both Petitioner and the rapist. Petitioner sought to compel arbitration of Ms. Smith's claims, but the Mississippi Supreme Court – applying traditional state law contract interpretation principles – held that her claims did not "relate to" or "arise out of" her employment, and thus that the case did not fall within the scope of the arbitration agreement.

Displeased with this interpretation of its contract, Petitioner unleashes a scathing attack upon the integrity of the Mississippi Supreme Court. Supported by no evidence, Petitioner repeatedly accuses the Mississippi Supreme Court of "manipulating" the contract's language in order to establish a rule that civil cases involving sexual assault may never be arbitrated. *E.g.*, Pet. at i, 2, 11.

In order to protect against the supposed specter of future court decisions dishonestly "manipulating" contract language out of a secret desire to keep sexual assault cases out of arbitration, Petitioner asks this Court to exercise its certiorari jurisdiction. More specifically, Petitioner asks this Court to hold that the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"), provides that whenever an employee has a dispute

with her employer involving a rape in the workplace, this dispute falls within the scope of an agreement to arbitrate disputes that "arise from or relate to" her employment as a matter of federal contract law. This narrow and idiosyncratic Petition does not begin to justify the exercise of this Court's jurisdiction.

First, there is no genuine conflict between the decision of the court below and any other court in the United States. Petitioner alleges the existence of a conflict, by mischaracterizing the decision below as supposedly being an unreasonable refusal to enforce an unambiguous arbitration clause, and then contrasting it with cases involving unrelated issues where courts did enforce arbitration clauses. Petitioner also argues that some lower courts are "confused" as to the relationship between state and federal law with respect to some types of challenges to arbitration clauses. In fact, however, the basic principles of law in this area are clear and well established – the interpretation of the language and scope of arbitration contracts (as with other contracts) is generally a matter governed by state law, unless that state law disfavors arbitration clauses relative to other contract provisions. There is no conflict on these principles.

Second, the decision below is entirely consistent with the decisions of this Court setting out these two principles. Petitioner's assertions of error depend upon the premise that the court below is hostile to arbitration and acted completely unreasonably. In fact, the Mississippi Supreme Court has regularly

and repeatedly enforced arbitration clauses in all sorts of cases, including tort cases, and *including another sexual assault case involving claims that were within the scope of the arbitration clause. See Magnolia Healthcare, Inc. v. Barnes ex rel. Grigsby*, ___ So.2d ___, 2008 WL 95814 (Miss. Jan. 10, 2008) (*compelling* arbitration in a case where a woman with the mental capacity of a three-year-old sought tort damages after being sexually assaulted in a nursing home). In addition, the decision of the court below is entirely defensible based upon the contract language at issue here. The court below effectively held that Ms. Smith's "employment" consisted of her work of a restaurant. Because she was neither hired nor paid to be raped, her claims against her employer did not "relate to" or "arise from" her employment. Petitioner could have easily used contract language that would have placed these claims within the scope of the clause (such as providing that disputes arising from events occurring on its premises must be arbitrated). It did not. Petitioner used language that few employees would have imagined would apply to a case such as this one. Thus, the decision below was a matter of contract interpretation, pure and simple, and utterly lacking in any indication of hostility to arbitration. For this reason, there is no basis for concluding that the decision below conflicts with any of this Court's decisions counseling against hostility to arbitration.

More broadly, Petitioner requests that this Court rule that any decision holding that some dispute falls

outside of the scope of an arbitration clause – something which is largely a question of state law under this Court's current decisions – should instead effectively become entirely a federal question. Petitioner's suggestion that the law of interpreting contract language in arbitration agreements be treated as a question of federal law sharply conflicts with this Court's jurisprudence of FAA preemption, as well as this Court's broader jurisprudence of conflict preemption generally.

Finally, at its end, the Petition tosses in a short assertion that Petitioner's due process rights were violated because the court below decided the case on an issue that was not briefed by either party, even though Petitioner's arguments on the point were subsequently heard by the court below on a petition for rehearing. This argument is entirely novel and unsupported by any authority other than references to vague statements about the right to be heard. Plainly, this alone is not sufficient ground for this Court to grant review.

## STATEMENT OF THE CASE

### A. The Underlying Case

Respondent Tammy Smith applied for a job at Capt. D's restaurant when she was 17 years old. It was the first job of her life. When she applied for the job, Ms. Smith was asked to sign a short document ("Employment Dispute Resolution Plan Sheet")

referencing Capt. D's arbitration plan, but was not actually given a copy of the 32-page plan. It was made clear to Ms. Smith that she could not get the job unless she signed the Employment Dispute Resolution Plan Sheet. Later, Ms. Smith was given an earlier version of Capt. D's arbitration plan, but not the one that was in effect at the time that her employment began. Because she was not yet an adult, the restaurant's management insisted that her grandmother (who was not her legal guardian; she lived with her father) also sign the application. According to the undisputed testimony, neither Ms. Smith nor her grandmother understood the concept of arbitration; her grandmother thought that it referred to some special legal requirement that must be fulfilled for a minor to work at restaurants.

Within a few weeks of beginning her employment, Ms. Smith (still 17 years old) was forcefully raped by the restaurant's manager, who was a convicted sex offender.

About seven months later, Ms. Smith filed a complaint alleging several torts under Mississippi law against both Petitioner and the rapist. Petitioner moved for the trial court to compel arbitration of her claims. At the same time that it demanded arbitration, Petitioner also asked the trial court to resolve an arbitrable issue, moving for the court to dismiss most of Ms. Smith's claims on the grounds that they were supposedly barred by the Workers' Compensation Act. The trial court granted Petitioner's motion to compel arbitration, and dismissed Ms. Smith's claims. The

trial court's decision was affirmed by a panel of the Mississippi Court of Appeals, whose decision in turn was appealed to the Mississippi Supreme Court.

### B. The Mississippi Supreme Court's Decision

Reversing the lower courts, the Mississippi Supreme Court began by setting forth the premise that there is a strong and liberal federal policy favoring the enforcement of arbitration agreements. Pet. App. A at 7a. Nonetheless, the court cited with approval a Second Circuit decision establishing the noncontroversial position that arbitration agreements "must not be so broadly construed as to encompass claims and parties that were not intended by the original contract." *Id.*, quoting *Thomson-CSF, S.A. v. American Arbitration Association*, 664 F.3d 773, 776 (2d Cir. 1995). After reviewing Mississippi precedent addressing similar issues, the court held that "we unquestionably find that a claim of sexual assault neither pertains to nor has a connection with Tammy's employment." Pet. App. A at 11a.

Petitioner then filed the instant petition.

## REASONS FOR DENYING THE PETITION

### I. There Is No Split in Authority on the Questions Presented in the Petition.

To establish a conflict on an issue of federal law between the decision below and any other state high

court or federal appellate court, Petitioner must identify *some* court holding that the FAA requires that claims arising from a rape at a workplace are within the scope of an agreement requiring arbitration of claims that "arise out of" or are "related to" the employment of the victim. Petitioner fails to do so. Instead, the Petition attempts to manufacture a conflict by mischaracterizing the decision below as a flat refusal to enforce an arbitration clause in the face of the only possible reading of its language, Pet. at 22, and then asserts that this straw man caricature conflicts with a host of courts that have enforced arbitration clauses. Pet. at 22-23. By beginning with the incorrect assumption that the opinion below is a dishonest refusal to obey federal law (an assumption thoroughly disproven in Part II-A below), Petitioner conjures up an imaginary conflict with a host of courts applying different contract language to completely different types of cases and totally unrelated causes of action, and addressing unrelated issues. Indeed, many of the cases cited in the Petition, at 22-23, do not even involve arguments that the disputes in those cases were outside the scope of the arbitration clauses at issue.

The only even arguably relevant case that Petitioner identifies is *Ryan's Family Steak Houses, Inc. v. Regelin*, 735 So.2d 454 (Ala. 1999). Pet. at 23-24. It is true that in *Regelin*, the court enforced an arbitration clause in a case involving claims of assault. But the very brief legal discussion in the short decision does not mention any question about the scope of the

arbitration clause. Indeed, the entirety of the legal discussion in the *Regelin* case consists of a few sentences pointing out that the plaintiffs there had introduced no evidence that they had not signed the arbitration clause or had been defrauded into it. There is no conflict between the reasoning or language of the decision in *Regelin* and this case; there is only the fact that the cases reached different results. The differing conclusions as to state law set forth by these two courts hardly justify the exercise of this Court's jurisdiction. *See* Michael S. Schenberg, *Identification, Tolerability, and Resolution of Intercircuit Conflicts*, 59 N.Y.U. L. Rev. 1007, 1013-14 (1984) ("when two courts apply the same legal rule to similar facts and reach different conclusions, the presumption is that there is no conflict.").

Having failed to allege a genuine conflict between this case and any other decision from a state high court or federal appellate court, the Petition urges that this Court grant review to clarify the law. The Petition notes that a panel of the Fifth Circuit has confessed to confusion about the law in the general area of "the dance" between federal and state law in the enforcement of arbitration clauses that "cries out to be settled." Petition at 12-13 (citing *Washington Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260 (5th Cir. 2004)). In so arguing, Petitioner cites to a statement in the *Bailey* case that, in deciding challenges to arbitration clauses, it "is often an uncertain question" as to when a court should apply state law or when a court should apply federal law.

*Bailey*, however, is wholly inapposite. This case involves a dispute as to whether certain claims fell outside the scope of an arbitration clause. *Bailey* did not involve a challenge to the scope of an arbitration clause. Instead, it involved challenges to the enforceability of an arbitration clause based upon the alleged inability of the plaintiff to read or understand the clause, and the alleged unconscionability of the clause. Thus, even if it were true that many courts in the U.S. are confused about the relationship between federal and state law relating to the subjects at issue in *Bailey*, that confusion would not be alleviated by this Court granting *this* Petition and deciding the issue posed in *this* case.

In any event, there is no such "confusion" regarding the basic legal principles that govern whether a particular claim falls within the scope of a particular arbitration clause. In essence, there are two principles applicable here, neither of which is controversial as a matter of law. First, notwithstanding Petitioner's heavy emphasis on the supposedly dominant role of federal law, *e.g.*, Pet. at 14-15, this Court has directed that the interpretation of the language of arbitration clauses is generally a matter for state law. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) ("when deciding whether the parties agreed to arbitrate a certain matter . . . courts generally should apply ordinary state-law principles that govern the formation of contracts"); *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) ("the interpretation of private

contracts is ordinarily a question of state law, which this Court does not sit to review"); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003) (the contractual interpretation question of whether an arbitration clause permitted class actions in arbitration was "a matter of state law. . . .").[1]

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[1] This Court has repeatedly recognized the significant role reserved for state law under the FAA in a variety of other contexts in addition to scope determinations. For example, this Court has noted that the rules of state contract law provide the primary source of protection for consumers against corporate over-reaching in cases governed by the FAA. *See, e.g., Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.'"). There are innumerable cases in which courts have applied generally applicable state contract law to arbitration clauses, even when the application of those laws barred the enforcement of a given arbitration clause with respect to a given case. For example, the generally applicable rule of contract law that ambiguities in contracts will be interpreted against the drafter is routinely applied to arbitration clauses, even where it results in not requiring a party to arbitrate her or his claims. *See, e.g., Victoria v. Superior Court*, 222 Cal. Rptr. 1 (1985), *reh'g denied* (1986); *Dumais v. American Golf Corp.*, 299 F.3d 1216, 1219-20 (10th Cir. 2002); *Quigley v. KPMG Peat Marwick, LLP*, 749 A.2d 405, 416 (N.J. Super. Ct. App. Div. 2000). Similarly, the generally applicable rule of contract law that specific contract provisions will govern over general provisions applies to disputes over the construction of arbitration clauses, even when it has the effect that a party will not be required to arbitrate her or his claims. *See, e.g., Transit Casualty Co. in Receivership v. Certain*

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The second legal principle applicable to this dispute is as uncontroversial as the first one. This Court has recognized an exception to the rule that arbitration clauses are governed by state contract law for those instances where state contract laws target arbitration clauses for treatment that is inferior to other types of contracts. *See, e.g., Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (noting that the FAA preempts a state statute that imposed specific disclosure requirements applicable only to arbitration agreements and explaining that, through the FAA, Congress precluded states from singling out arbitration provisions for suspect treatment); *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal footing, directly contrary to the Act's language and Congress' intent.") This exception does not apply here, because, as set forth in Part II-A and II-B below, the Mississippi Supreme Court's ruling in this case is not based in any hostility to arbitration, does not single out the arbitration clause for uniquely unfavorable treatment, and is a perfectly reasonable reading of the contract language at issue.

In sum, the principles governing whether a given cause of action is outside of the scope of an arbitration clause are well established and noncontroversial.

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*Underwriters at Lloyd's of London*, 963 S.W.2d 392, 399 (Mo. Ct. App. 1998).

It is beyond peradventure that state law governs the interpretation of contractual language, so long as the state law does not disfavor arbitration clauses relative to other types of contract terms. Petitioner has not shown, and cannot show, a conflict or a "state of confusion" about either these broad principles or their application to this case. Thus, there is no split of authority or disarray among the lower courts that would warrant this Court's exercise of its *certiorari* jurisdiction in this case.

## II. The Decision Below Is Entirely Consistent With This Court's Jurisprudence.

### A. Mississippi Law Is Not Hostile to Arbitration.

Nor is there any basis to Petitioner's claim that review is warranted because the decision below conflicts with Court's decisions prohibiting unwarranted "hostility" to arbitration. As explained above, Petitioner's theory depends upon the conclusion that the Mississippi Supreme Court's decision reflects some general hostility to arbitration and, more specifically, a desire to "create a rule of law" that tort claims – and even more specifically, sexual assault claims – are never suitable for arbitration. *E.g.*, Pet. at 9, 11, 17, 20. If Petitioner does not convincingly establish this premise, then there is no conflict on any federal issue of law and the entire logic of the Petition collapses.

In fact, the Mississippi Supreme Court is entirely innocent of any hostility to arbitration. Notwithstanding the harsh conclusions that Petitioner draws from the fact that it lost this one particular case, the broader record evident from a large number of decisions demonstrates that the Mississippi Supreme Court has vigorously enforced the FAA, and has repeatedly and regularly compelled arbitration. Just this year, for example, that Court enforced an arbitration clause in a sexual assault case. *See, e.g., Magnolia Healthcare, Inc. v. Barnes ex rel. Grigsby*, ___ So.2d ___, 2008 WL 95814 (Miss. Jan. 10, 2008) (compelling arbitration of claims of a nursing home resident with the mental capacity of a three-year-old who claimed that she was negligently treated, abused, and *sexually assaulted* while a resident at the nursing home). *Magnolia Healthcare* conclusively rebuts Petitioner's claim that the Mississippi Supreme Court has erected some blanket rule barring arbitration of civil litigation arising out of sexual assaults. *Magnolia Healthcare* demonstrates that the Mississippi Supreme Court's decision below is what it says it is – an interpretation of particular contract language – rather than a subterfuge.

Similarly, a number of other Mississippi Supreme Court decisions demonstrate that it has erected no rule against compelling arbitration in tort cases, notwithstanding the claims of bias and "manipulation" throughout the Petition. *E.g., Cleveland v. Mann*, 942 So.2d 108 (Miss. 2006) (compelling arbitration in wrongful death case brought against a

surgeon after patient's bowel was punctured during a hernia operation); *Doleac v. Real Estate Professionals, LLC*, 911 So.2d 496, 504 (Miss. 2005) (enforcing an arbitration clause in a real estate lease dispute, and holding that "tort claims . . . are subject to the arbitration clause"). This is obviously not a court that is reluctant to send tort claims – including tort claims involving grievous personal injuries – to arbitration.

The great willingness of the Mississippi Supreme Court to compel arbitration of all manner of disputes is further evident from a host of cases not involving tort claims decided in just the past few years. *See, e.g., Century 21 Maselle and Associates, Inc. v. Smith*, 965 So.2d 1031 (Miss. 2007) (compelling arbitration against real estate purchasers claiming negligence and fraud); *Fradella v. Seabury*, 952 So.2d 165 (Miss. 2007) (compelling arbitration against real estate purchasers, even though the real estate agent was not a signatory to a purchase agreement); *Greater Canton Ford Mercury, Inc. v. Ables*, 948 So.2d 417 (Miss. 2007) (compelling arbitration in case involving used car sale); *Equifirst Corp. v. Jackson*, 920 So.2d 458 (Miss. 2006) (compelling arbitration in mortgage case, denying unconscionability challenge); *Sullivan v. Protex Weatherproofing, Inc.*, 913 So.2d 256 (Miss. 2005) (enforcing arbitration clause in employment case).

Even if the Mississippi Supreme Court had not already established this extensive pro-arbitration jurisprudence, this Court should not entertain Petitioner's repeated suggestions that the proper starting

point for this Court's analysis is to begin with a deep suspicion of the motives and integrity of the court below. While Petitioner is quick to levy allegations that the decision below was rooted in the results-oriented manipulation of contract language for the purpose of denying arbitration in cases involving the rape of young employees, this opening premise of suspicion is wholly inappropriate. Instead, this Court should begin with a strong presumption that the duly elected high court of a sovereign state is acting with integrity and honesty in its work. *See, e.g., Ballard v. C.I.R.*, 544 U.S. 40 (2005) ("This Court generally does not assume abdication or impropriety, . . . and should not impugn the integrity of judges based on an un-substantiated, non-specific affidavit.")[2] This Court should not exercise its jurisdiction out of a losing litigant's generalized suspicion that a state high court is "manipulating" language to achieve improper results.

### B. The Lower Court's Interpretation of the Contract Language At Issue In This Case Was Reasonable.

Petitioner's claim that the alleged "hostility" of the Mississippi Supreme Court to arbitration warrants

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[2] *Cf. K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988) ("without firmer evidence tending to impugn a legislator's integrity, the presumption that legislators mean what they say would seem more appropriate than the opposite presumption that the Court of Appeals applied.")

review is further undermined by the evident reasonableness of the lower court's interpretation of the contract. The Petition repeatedly simply assumes that it is self-evident that the only plausible reading of the language of Petitioner's arbitration clause would include Ms. Smith's claims. In reality, this assumption has no basis, and the decision below is an entirely reasonable reading of the agreement's language.

First, few (if any) employees would expect that a forcible rape was something that would "arise out of" their employment. In looking forward to the first job of her life, Ms. Smith would reasonably expect that the work of a restaurant – cleaning and maintaining the premises, serving customers, preparing food – would arise out of her employment. She might also expect that issues relating to the conditions and compensation for her work would "arise out of" her employment. It is beyond a stretch to read this phrase to include a rape.

Similarly, it is hard to imagine that any employees would believe that a forcible rape "relates to" employment in a restaurant. Petitioner assumes that this phrase must be read as broadly as possible, but in other contexts, this Court has noted that interpretations of the phrase "relate to" must be tempered by normal expectations. For example, in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), this Court held that surcharges on the bills of a health plan did not "relate to" the plan. This Court noted that it

would be possible to read the phrase "relate to" broadly enough to find that the surcharges related to the plan, but rejected such "uncritical literalism":

> If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere," H. James, Roderick Hudson xli (New York ed., World's Classics 1980).

*Id.*, 514 U.S. at 655.[3]

In short, it is Petitioner's interpretation of the arbitration clause at issue that sweeps too broadly. Characterizing the decision below as evidencing a "hostility" to arbitration is simply in error. The fact is that Petitioner failed to draft an arbitration clause as broadly as it now wishes that it had done. Rather than see this as an error in draftsmanship that it could fix, Petitioner places all the blame on the

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[3] Petitioner could easily have drafted its arbitration clause more broadly if it intended to require its employees to arbitrate claims arising out of forcible rapes at the work place. A number of arbitration clauses that are in widespread use in the United States provide that any claims arising from events or incidents that take place on specified premises must be arbitrated. *E.g.*, *Derlantis v. Heritage Convalescent Hosp., Inc.*, 2005 WL 1275143 (Cal. Ct. App. 2005) (nursing home arbitration clause covers claims arising from events on the premises); *Pepsi-Cola Albany Bottling Co. v. Int'l Broth. of Teamsters, Local 669*, 1998 WL 315092 (N.D.N.Y. June 10, 1998) (arbitration clause covered illegal actions such as selling drugs "on Company premises at any time").

supposed hostility of the Mississippi Supreme Court to permitting any civil claim involving sexual assault to ever be arbitrated. But this alleged hostility does not exist. Accordingly, the only reasonable explanation for the decision below is not a desire to undermine the Federal Arbitration Act, but instead a natural and reasonable reading of the specific language of Petitioner's arbitration clause.

### C. Petitioner's Suggestion That This Court Should Federalize Disputes Over the Scope of Arbitration Clauses Does Not Justify the Exercise of This Court's Jurisdiction.

Although the Petition does not say so directly, it is essentially a call for this Court to significantly expand the scope of preemption under the FAA far beyond the bounds previously spelled out by this Court. This radical and unsupported argument does not justify this Court's intervention in this narrow dispute.

There is no dispute that, if Mississippi law governs the question of whether the claims at issue in this case fall within the language of the particular arbitration agreement in this case, the claims are not arbitrable and Ms. Smith prevails. Petitioner does not cite to any Mississippi case holding that a rape is something that "arises out of employment." Indeed, Petitioner acknowledges (and complains) that state law is against it. Instead, Petitioner asks this Court

to grant the Petition and rule that federal law overrides and preempts Mississippi law on this point. *E.g.*, Pet. at 24. Petitioner repeatedly argues for a broader role for federal law in the adjudication of disputes relating to arbitration.

Petitioner couches its Petition as a request for this Court to enforce the limitations it has already placed upon state law with respect to arbitration clauses, but that posture is misleading. In fact, Petitioner's claim for a broadly expanded preemption inquiry in disputes over the scope of arbitration clauses must be analyzed in light of the strong presumption against federal preemption of state contract law. This Court has directed repeatedly that, "[i]n areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" *Bates v. Dow Agrosciences*, 544 U.S. 431, 449 (2005) (internal citations omitted). The presumption against preemption applies both to the existence of preemption and the scope of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-85 (1996). The presumption helps ensure that the balance between federal and state power will not be disturbed unintentionally by Congress or unnecessarily by the courts. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

In light of this heavy presumption, this Court has held that federal law may preempt state law in only three circumstances: (a) when Congress has expressly provided for preemption; (b) when Congress intends

for federal law to occupy a field; or (c) where state law conflicts with a federal statute. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 371 (2000). As this Court has recognized, however, "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989). Therefore, the FAA can displace state law only through the doctrine of implied conflict preemption. *Id.* at 477-78.

In order to establish that the FAA impliedly preempts Mississippi law holding that the phrase "arising out of or relating to . . . employment" does not include rapes in the workplace, Petitioner must demonstrate that there is an "actual conflict" between federal and state law, either because it is "impossible for a private party to comply with both . . . requirements" or because the state laws "stand[ ] as an obstacle to the accomplishment and execution of the full purposes" of Congress. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (citations omitted). For this Court to find such a conflict, it would have to find that there is a federal contract law answer to the contract interpretation question posed here. Petitioner, however, points to no rule of federal law on this subject. Instead, it depends upon its repeated assumption that the decision of the Court below was self-evidently wrong and can only be explained by supposed hostility towards arbitration.

This is not surprising, because no federal law – contract or otherwise – addresses the subject at issue in this case. In cases such as this, this Court has refused to find preemption. *See, e.g., Freightliner*, 514 U.S. at 289-90 (unanimous holding that common-law claims involving a manufacturer's failure to install antilock brakes in trucks are not preempted by the Motor Vehicle Safety Act because "[t]here is no express federal standard addressing [antilock brakes] for trucks or trailers.").

This Court should reject Petitioner's request that this Court use this case as a vehicle to delve into (and re-write) normal state law principles governing contract interpretation. This Court should refuse the invitation to federalize the interpretation of all arbitration agreements, as contract law is an area traditionally governed by state law. While there is a body of federal common law governing contracts in a few narrow areas (such as in collective bargaining disputes governed by the federal labor laws or in certain maritime settings), few areas of law have been more deeply entrusted to the states than the law of contract formation. *See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 84 (1982) ("the cases before us, which center upon appellant Northern's claim for damages for breach of contract . . . , involve a right created by *state* law. . . ."), 458 U.S. at 90 (emphasis added, Rehnquist, J., and O'Connor, J., concurring) ("the lawsuit . . . seeks damages for breach of contract . . . which are the stuff of traditional actions at common law. . . . There is

apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims . . . arise entirely under state law."); *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) ("[C]ommercial agreements traditionally are the domain of state law. State law is not displaced merely because the contract relates to intellectual property which may or may not be patentable"); *Pan Am. Petroleum Corp. v. Superior Court*, 366 U.S. 656, 663 (1961) (contract dispute) ("The suits are thus based upon claims of right arising under state, not federal law. . . . The rights as asserted by Cities Service are traditional common law claims."); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 40 (1988) (Scalia, J., dissenting) ("Nor can or should courts ignore that issues of contract validity are traditionally matters governed by state law.").

In sum, Petitioner has not demonstrated that there is any conflict between the decision below and either any decision by another state high court or federal court of appeal, or any conflict between the decision below and any decision of this Court, and Petitioner has not justified why this Court should create any new body of federal contract law that would change the result in this case.

## III. Petitioner's Constitutional Argument Is Unworthy of a Grant of *Certiorari*.

Nor is the due process argument raised by Petitioner worthy of review by this Court. Petitioner

makes a great deal of the fact that the question of the scope of the arbitration clause was not addressed in the briefs of the parties prior to the Mississippi Supreme Court's decision. *E.g.*, Pet. at 7-10, 17-18, 20-21. Petitioner argues that this fact proves that the decision below was motivated by a hostility towards arbitration, a contention disproven in Part II-A above. In addition, in the last few pages of the Petition, Petitioner goes so far as to allege that it violates the United States Constitution for an appellate court to decide a case based upon an issue not briefed before it. Pet. at 25-26. Petitioner's novel constitutional argument asks this Court to create an entirely new constitutional right that would ban a fairly common practice in state and federal appellate courts, and limit the discretion of those courts to decide cases as they think best.

Petitioner's constitutional argument does not justify this Court's review, in part because it would inject this Court into a very commonplace appellate practice. Notwithstanding Petitioner's multiple protestations of shock that the court below considered an issue not presented in the briefs, it must be recognized that as a matter of empirical reality it is far from uncommon for courts throughout the United States to decide issues that have not been briefed on appeal. Appellate courts have an obligation to issue decisions setting forth the correct legal answers in cases, and not merely selecting between possible answers that were thought of by the litigants before them. For just a few of the many illustrations that

could be given of courts deciding cases based upon issues not included in the briefs, *see, e.g., U.S. v. Escamilla-Vasquez*, 201 Fed. Appx. 181 (4th Cir. 2006) (choosing to hear arguments not raised in a party's brief); *Sash v. Zenk*, 439 F.3d 61 (2d Cir. 2006) ("We write to address an issue not raised in the briefs or oral argument in this case"); *Armstrong ex rel. Armstrong v. Brookdale University Hospital*, 425 F.3d 126 (2d Cir. 2005) ("The failure of plaintiffs to raise this argument in their briefs does not preclude us from reaching it because it presents a pure issue of law, *Lambert v. Genesee Hosp.*, 10 F.3d 46, 56 (2d Cir. 1993) (resolving a dispositive issue sua sponte because, in part, it was not necessary to resolve any issues of fact)"); *Consumers Union of U.S., Inc. v. Fed. Power Comm'n*, 510 F.2d 656, 662 (D.C. Cir. 1975) ("[R]egarding the contents of briefs on appeal, we may also consider points not raised in the briefs or in oral argument. Our willingness to do so rests on a balancing of considerations of judicial orderliness and efficiency against the need for the greatest possible accuracy in judicial decisionmaking. The latter factor is of particular weight when the decision affects the broad public interest.") (footnotes omitted); *Wells v. Chevy Chase Bank, F.S.B.*, 768 A.2d 620, 630 (Md. 2000) (deciding case on an issue that "[w]e recognize neither party has argued. . . .").

This Court should not grant the Petition, because under Petitioner's novel theory, all of these court decisions – and scores more like them – would be constitutionally suspect. Not only is it fairly common

for appellate courts to address decisive issues that parties failed to notice or brief, but there are some issues (such as subject matter jurisdiction) that appellate courts are required to raise and address even if the parties failed entirely to address them. *E.g.*, *Olivera-Garcia v. INS*, 328 F.3d 1083, 1086 (9th Cir. 2003) ("subject matter jurisdiction may not be waived"). The Petition does not acknowledge the radical nature of the position it asks this Court to embrace.

Petitioner's constitutional argument also does not justify this Court's review, as it lacks serious support in the case law. For Petitioner to prevail upon this ground, this Court would have to break completely new ground. None of the authorities that Petitioner cites in support of its constitutional argument involves court decisions addressing issues not briefed to those courts, or any factual scenario that even remotely approaches such a situation. Instead, Petitioner relies upon general platitudes about the nature of due process from cases that involve completely unrelated issues. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1970), Pet. at 26, addressed whether known beneficiaries of a trust had to be given notice and an opportunity to make claims to the trust. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), Pet. at 26, dealt with the notice to be given to absent class members in a class action. Neither these nor any of the other cases cited by Petitioner relate to or support the constitutional claim it advances here.

Finally, Petitioner's constitutional argument does not justify this Court's review, because Petitioner *did* receive an opportunity to have its arguments heard relating to the scope of its arbitration clause. Petitioner moved for rehearing, and filed briefs, on the issue of the scope of its arbitration clause. After reading those briefs, the Mississippi Supreme Court rejected Petitioner's argument. Petitioner nonetheless argues that its due process rights were violated even though it presented all of its arguments to the court, and had those arguments heard, citing *Armstrong v. Manzo*, 380 U.S. 545 (1965). *Armstrong* is not remotely applicable to this context. There, the biological father of a child was not notified when the child was put up for adoption. Only after the adoption decree was issued did the biological father learn of the adoption and contest it. This Court held that in that context, an after-the-fact notice did not protect the father's due process rights because *the burden of proof* that he faced changed as a matter of law due to the entry of the adoption decree. 380 U.S. at 551. In this case, by sharp contrast, nothing happened to Petitioner as a consequence of the delay between the original decision of the Mississippi Supreme Court and its later reconsideration based upon Petitioner's demand for rehearing. No trial was held, no burden of proof was shifted, Petitioner was not prejudiced or harmed in any way. In short, Petitioner's constitutional argument is without any merit.

## CONCLUSION

For all the reasons set forth above, this Court should deny the Petition for certiorari.

Respectfully submitted,

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